

THE  
TOUCHSTONE  
OF  
Precedents,

Relating to JUDICIAL PROCEEDINGS

AT

Common Law,

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By G. F. of *Graves-Inn*, Esquire.

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*In magnis voluisse sat est. Hor.*

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TOUCHSTONE



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TO THE  
READER.

**N**Owithstanding the present Age hath so plentifully abounded with Books of Pleading in Publick; yet certainly there hath been as manifest a Deficiency of some good Directions for the Understanding them; tho' perhaps one Reason hath been, for that Pleading is esteemed by the Learned the most difficult part of the Study of the Law, and therefore Collections of this Kind more liable to the Censure of the Overcritical.

'Tis true, there are two Tracts extant upon this Subject; but it happens so unluckily, that one is but the particular Observations of a single Person in part of his Time at the Bar, and the other as Antique or Obsolete as the Language it is

## To the Reader.

writ in, and much wanting the finishing hand of the Designer: Such hath been our misfortune as to this Subject, and we may well deplore our ill fate, that none of the Learned Gentlemen of the Long Robe hath yet given us their Rules and Methods on a Subject so Excellent as the Incomparable Littleton doth Characterize it, viz. And know my Son, that it is one of the most honourable laudable and profitable things in our Law to have the Science of good Pleading in Actions Real and Personal; and therefore I counsel thee especially to employ thy Courage and Care to learn it. The Reader will here find most Excellent Directions, to guide him in his Practice through the Difficulties of the several Parts of Pleading, wherein the Nature of Writs, Counts, Barrs, Pleas, Replications, Rejoinders, Issues; as also Disclaimers, Discontinuances, Estoppels, Conclusions, Departures, Double Pleas, &c. are Succinctly and Methodically handled,  
from

## To the Reader.

*from Authorities in the Law, both Ancient and Modern, far more useful and beneficial than any Collection hitherto Published, as will sufficiently appear to any intelligible Person upon a strict and serious perusal of the Book it self.*

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To the Reader

From the Editor of the *Journal*  
and *Review*, for more than  
four years, and the *Collection*  
of *papers*, as well as *manuscripts*  
and *illustrations*, of the *Book* it is

## Abatement of Writ or Count.

**I**N Debt by two Executors, one was summoned and severed, and dyed; and it was adjudged that it should not abate the Writ. *Co. 10. Read and Redman's Case.*

If there be two Joynt-Tenants, and the one is summoned and severed, and dyes, the Writ shall abate; but in a *Stire facias* the death of one after Summons and Severance, shall not abate the Writ, *Co. ib.* Where note the difference between a Writ Original, and a Judicial Writ.

Two Coparceners, one is summoned and severed; and hath Issue, and dyes, there the writ shall abate, for that his Issue hath Title to the Moiety. *Co. ibid.* But if one of the Coparceners takes husband, the writ shall not abate.

In all Actions personal or mixt where the intire thing is to be recovered, as in *Quare Impedit*, *Detinue* of writings, and the like, there after summons and severans the death of one shall not abate the Writ. Also the death of one after Judgment in personal

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Actions shall not abate the writ, although there be no severans. *Co. ib.*

Where the Writ goes in discharge as an *Audita Querela*, and the one is summoned and severed, and dies, the Writ shall not abate, *Co. ib.*

*Note*, In all personal Actions where no severans lyes, there the death of one of the parties shall abate the Writ; but not, if it be a Judicial Writ after Judgment. *Co. ubi supra.*

In *Formedon* against divers, some plead *Non tenure*, and others take the Tenancy upon them intirely. the writ shall not abate, and those who plead *Non tenure* shall not have Judgment, 22 *E.4.4.* 4 *E.4.* 33. *a.* *Stat.* 25 *E.3.* 13.

*Misnomer* in a *Scire facias* shall abate the writ, 9 *E.4.* 35. *a.*

If a *Præcipe* be brought of a Mannor and 20 s. Rent, it is a good Plea to say, that the Rent is parcel of the Mannor. So in *Formedon* for Land, it is a good plea to say, that the Demandant hath brought another *Formedon* of 20 s. Rent issuing out of the same Land, 3 *H.7.* 3.

A Writ was brought against *A. Rector* of *B. de placito debiti* 100 s. The Defendant pleaded, That *die impetrationis predicti brevis* he was commorant at *C.* in another County; but the Court would not allow the Plea, because

cause a Rector is always supposed to be resident upon his Benefice; *quod nota*. So a man that hath two Benefices shall be intended to dwell upon them both, although he doth not deny that he is Parson. 10 *H. 6. 8. Co. 11. Magdel. Colledg Case.*

In a Writ of Right of Advowson against *A. B. Dean of C.* he pleaded, That by Authority of Parliament the Corporation was defeated and avoided; and it was held by *Brian* to be a good Plea, 4 *H. 7. 7. Rast. Entr. 101, 182.*

In Assise it is a good plea to the Writ to say that the Plaintiff was seised of the Freehold of the Lands in the Plaint, but in a Forcible Entry it is no plea to say that he was seised the day that the Writ was purchased, 5 *H. 7. 41.*

Death or Coverture at the time of purchasing the writ, shall abate the writ *de facto*, but Coverture afterwards makes it but abateable, 32 *H. 6. 11. 3. Br. 138. Co. Entr. 173. Rast. Entr. 107, 108, 126, 161.*

It is no Plea to the Writ to say that the Summons were of other Lands, for the Defendant may wage his Law *de non Sum.* 37 *H. 6. 26.*

A *Quare Impedit* was brought, and the Plaintiff made his Title to the Advowson as appendant; The Defendant said, that a Moiety was in Gross, and it was doubted whether

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ther this Plea should go to the Writ, or to the Action, 32 H. 6. 10, 11, 12.

A *Quare Impedit* is brought against the Incumbent without naming the Parron (he being alive) this makes the Writ only abatable, and is not good upon a Writ of Error.

In a Writ of *Quare Impedit* or other Original Writs, the death of the King before Judgment shall abate the Writ *de facto*, but it is otherwise where the Defendant dies. But in an Information for the King, or for the King and the Informer, upon the death of the King before Judgment, the whole Proceedings are discontinued, but the Information it self shall stand good, and Process shall be awarded against the party *de novo*. So of Indictments (that are not for Felony or Treason) for after Trial they are within the Statute of 1 E. 6. ca. 7.

When the Original bears *Teste* before the cause of Action accrues, the Writ shall abate *de facto propter defectum*. *Anderson* 1. 241. a. 96. *Rast. Entr.* 459. *Co. Entr.* 624. *Brown's Entries* 1. Part, *Tit. Abatement*.

The death of the Plaintiff or Plaintiffs, or of one or more of the Plaintiffs, (where there be many) shall abate the writ. *Rast. Entr.* 416. *Fitz. N. Br.* 35. B.

Where it appears by the plaintiff's own shewing that he had not an Action for the whole, or for part, the Writ shall abate *de facto*,



*facto*, as in *Quare Impedit*, if it appears by the plaintiff's shewing that the Church is full by his own Presentation, the Writ shall abate *de facto*.

Some Pleas abate the Writ in the whole, and some but in part. As,

In Trespass against two, one appears and pleads that the other was dead *die impetrationis brevis*; or that there was no such person in *rerum natura*, there the whole Writ shall abate: But it is otherwise where one of the Defendants dyes after purchasing the Writ, 18 E.4.1. 2 H.7.16. *Rast. Entr.* 126.

Trespass against husband and wife, after Verdict and before the day in Bank the husband dyes, in *Cro. Caroli* 509. it is doubted, if the writ shall abate, but it is agreed there, That if the wife dyes it shall not abate against the husband. But in case for Slander by the wife the writ shall abate after Verdict. *Hob.* 129.

Account against two, one dyes after the first Judgment, the Writ shall abate only against him.

In Right of Advowson the Defendant pleads that the Plaintiff was seised of the sixth part *die impetrationis brevis*, this shall abate the whole Writ, 5 H.7.7.

In Debt upon an Obligation, the defendant pleads, That after the writ purchased, the plaintiff had received parcel, and shews an

Acquittance, the whole writ shall abate; and yet it is a good plea in barr for that part. 3 H. 7. 41. a. *Rast. Entr.* 160. 7 E. 4. 19. 15 H. 7. 10. 3 H. 7. 3. Quere if in Debt upon simple Contract the plaintiff receives part *pendente brevi*, if it shall abate the writ.

In Debt upon an Obligation with Condition to deliver 20 Quarters of Barley, the defendant pleads in Abatement, that *pendente billa* the plaintiff had accepted 15, parcel of the said 20; and adjudged to be an ill Plea, because it is collateral and not parcel of the Sum contained in the Obligation, 3 Cro. 253.

Where the defendant pleads matter that entitles the plaintiff or demandant to a better writ, it shall abate the other; as in a Writ of *Ayel, Seisin of the Father*. So in *Mortd' ancestor, his own Seisin, &c.* But in *Formedon*, or Writ of Right, *darrein Seisin* is no Plea; for in *Formedon* the Gift and not the *Seisin* is the Title; and it is not within the Statute of 32 H. 8. of *Limitations* to be brought within 50 years, 12 Eliz. Dyer 290. 4 E. 4. 32. b.

If the Tenant brings a Writ of *Mesne* of two Acres, and depending the writ he alieneth one of them, the writ shall abate.

The same Law in an Action of Wast brought of two acres, if the plaintiff aliens the Reversion of one of them, the writ shall abate.

Where

Where it appears that the writ was never good in part, it shall abate in the whole.

As in Trespass against 3, if one be dead after the writ purchased, the writ shall abate in the whole, *per 7 E. 4.*

The same Law, if Trespass be brought against three, and one saith, that there is no such Name in *Rerum Natura* as the third person's name, *Judicium de Breui*, if it be found, the Writ shall abate in the whole, because that I have joyned with me such a person who hath no colour or cause of affirmance, my affirmance shall abate.

Where the writ is good for part, and for part shall abate.

As in Debt upon Obligation against two, they both deny the deed, and it is found the deed of one of them, and not of the other, yet the Plaintiff shall recover against him whose deed it is, *40 E. 3.*

*Præcipe quod reddat* against Tenant for life, the Reversion descends to him depending the writ, the writ shall not abate.

*Misnomer* in Trespass shall not abate the writ but only against him who pleads the Plea, *5 E. 4. 2. 13. 2 H. 7. 16. 33 H. 6. 23.*

A *Præcipe* is brought by three jointly, several Tenancy in parcel, or in the whole, is pleaded by one of the Tenants, it shall abate the whole Writ, and against all. *Rast. Entr. 248. 270, 1, 2, 3. 364, 5. 282.*

In *Right of Advowson* against two as Jointenants, the death of one shall abate the writ; but *secus* in *Assise of Novel disseisin* or *Mortd'ancestor*; for there it sufficeth, if there be any Tenant to the Freehold. *Cro. Car.* 574. 583. *Rast. Entr.* 107.

In an Appeal against two, no such person in *Rerum Natura* as to one shall abate the whole writ; but it is otherwise of the death of one as it seems. 29 *H.7.* 21. 2 *H.7.* 8.

But it is otherwise in an *Assise*, or *Writ of Dower*, as in *Pollard's Case*, *Com'* 89. b.

In *Trespas* in *F.* and *H.* the defendant said that there is not any such Vill or Hamlet in the said County; and the better Opinion was, That, this Plea shall abate the whole Writ. 4 *E.4.* 33. a. *Co. Lit.* 155. b. *Rast. Entr.* 108, 298. *Co. Entr.* 121. But *Quare* how it should have been tried, for it seems by a Jury of the *Vifne* or Neighbourhood of *F.*

Debt against two Executors, one said, That whereas he is nam'd of *S.* that he was of *D.* the day of the Writ purchas'd, and prayes Judgment of the Writ; and agreed, That if the Plea was found for him, that the Writ should abate against both, and yet the other shall answer: but the other plea shall be first tried. 21 *H.6.* 4. *Rast. Entr.* 108, 295, 298, 299. 160.

In *Trespas* against two, one pleads that the

the place in question is within his Fee; and demands Judgment of this writ *quare vi et armis*; the writ shall abate against him only. So where the one is Feme covert, Jointenancy in the Demandant or Coparcener shall be pleaded in Abatement. 22 E. 4. 4. 2 H. 7. 16. Cro. Eliz. 554. Raft. Entr. 615.

In a *Quare Impedit* against two, one pleads, that there was no such Church as was named in the Writ; the other pleaded, that there was no such Bishop of *Lincoln* as was there named; and Issue was joyned upon the first Plea, but to the second Plea the Plaintiffs demurred: and the first being found for the Defendant, the whole Writ did abate. *Hobart* 250.

In a Writ of Error, the death of one of the Plaintiffs shall abate the whole writ.

Some Pleas in Abatement go only to the person of the plaintiff or defendant; others to the Writ, or Action: As

Excommunication in the Plaintiff or Demandant may be pleaded in disability of his person; but every Excommunication shall not disable. As if a Major, or Bailiffs and Communalty, or any other Body aggregate of many, bring their Action, Excommunication in the Major or Bailiffs shall not disable them, because they sue and answer by Attorney; but it is otherwise of a sole Corporation. So if Executors or Administrators be  
Excom-

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Excommunicated, they may be disabled, for every one that hath to do with a person Excommunicated, either by commerce or conversation, are also Excommunicated. *Co. Lit.* 134.

If a Bishop be defendant, an Excommunication by the same Bishop shall not disable the plaintiff; and if no other matter be shewn, it shall be intended for the same cause. *Co. Lit. ib.*

The Writ shall not abate for Excommunication in the Plaintiff, or Demandant; But the Judgment shall be, that the Tenant or Defendant shall go quit without day, because when the Demandant or Plaintiff hath purchased Letters of Absolution, and they are shewed to the Court, he may have a Resummons or Reattachment upon his Original according to the nature of his Writ. *Lit. lib.* 2. ca. 11. Sect. 42.

If an Alien brings an Action personal or mixt in his own right, the Defendant may plead it in *Abatement* in disability of his person, or in bar to the Action, with this difference, that in Actions personal, or Trespass for breaking his house, the defendant ought to aver, that the plaintiff is an Alien born at such a place under the Allegiance of such a Prince who is Enemy to our Sovereign Lord the King; for an Alien Friend as he may Traffick, and have a House for a habitation, so

so he may have an Action personal, and Trespas for breaking his house [as he may have a Writ of Error for necessity.] And the Opinion of the Lord Coke, in his Commentary upon *Littleton*, is, That if an Alien Friend brings an Action, it ought to be pleaded in disability of his person, and not in barr to the Writ or Action; but if he be an Alien Enemy, the Defendant may conclude to the Action. And therefore Mr. *Theloal* in his *Digest of Writs* well observeth, That an Exception taken to a Writ *propter defectum Nationis, vel potius defectum subjectionis vel Ligencie*, is peremptory, and that the Action cannot be revived by Peace, or League subsequent; and that the King may grant Licence to Aliens to implead, and likewise that such Aliens as come into the Realm by the Kings Licence or Safe Conduct may use personal actions by Writ, though they be not made Denizens; and that Denizens lawfully made by the Kings Grant; and such Aliens born as are within the express words of the Statute of 25 E. 3. may use actions real by Original Writ. *Co. Lit. 129. a. b. 130. b. Co. 7. 1. Theloal, Digest de Breifs, Lib. 1. ca. 6. 32 H. 6.*

23.

An Alien may be Administrator and have Leases for years as well as personal Chattels and Debts, *Cro. Eliz. 683. Cro. Car. 8. 9.*

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One brings an Action as Executor, Utlary in the plaintiff is no Plea, because he sues in *auter droit* ; but it is otherwise of Excommunication, 21 E. 4. 49. 34 H. 6. 14. 14 H. 6. 14.

If the defendant plead that the plaintiff is an Alien born, and conclude to the person, yet (it seems) he may demand the View, 3 H. 6. 55.

*For the Pleading of Matters of Record in Abatement, observe,*

That in *Formedon* for a Mannor, another *Formedon* depending for 20 s. Rent out of that Mannor, is a good Plea, 3 H. 7. 3.

That where in Trespass the defendant pleaded, that the plaintiff had brought *Replevin* against the Mayor and Commonalty of *A.* for the same cause, and that he was one of the Commonalty *die Captionis*, &c. *Necnon die impetrationis Brevis* ; and it was there agreed, That in Trespass a *Replevin* depending for the same Cause is a good Plea, if there be not more Defendants in the *Replevin* than in the *Trespass*, 8 H. 7. 27.

A *Quare Impedit* is brought against the Bishop, and another as Incumbent ; the Defendants plead, that the plaintiff hath brought another *Quare Impedit* against the said Bishop for the same Presentation which was then depend-



depending undetermined, and demands Judgment of the Writ: and it was adjudged a good Plea. But the plaintiff might have brought divers *Quare Impeditis* against divers Defendants, *Hobart* 138. 9.

So in an *Affise of Darrein Presentment*, it is a good Plea to say, *That there is a Quare Impedit depending for the same Presentation.* *Hobart* 184.

But where an *Affise* is brought of Lands in one County, an *Affise for the same Lands in another County*, and Judgment thereupon, cannot be pleaded; So of a *Recovery in Ancient Demesne*, because it cannot be intended, that the Lands recovered in the *Affise* or in *Ancient Demesne*, are the same Lands, 4 *H.6.24. Rast. Entr.* 65.

In *Formedon in le Descender*, it is no Plea to say, that the Plaintiff at another time brought a *Formedon in the Remainder* of the same Lands, except both the *Counts* be of one and the same Gift, 40 *E.3.31.*

Where the Heir brought two several *Formedons* upon one and the same Gift, although the last did vary from the first Gift, yet it is no Plea in *Abatement*, for he might claim by two Ancestors *sub dono*, 4 *E.3.8.*

If the Defendant (in a personal Action) pleads another Action depending at the time of the purchasing the last Writ, he ought not to say, that it is yet depending, for the last  
Writ

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Writ is abated in Law, notwithstanding he is afterwards non-suited in the first Writ, Co. 6. *Ferrers Case*. Where *Note* the diversity, when the writ is general, as *Covenant, Detinue, Assise &c.* and the Certainty is in the Declaration; for there if the Plaintiff is nonsuited in the first before he counts (or declares) the last shall not abate; and when the writ is special, and the thing demanded is specified therein, as in *Præcipe quod reddat*, &c.

*What persons shall be admitted to plead in Abatement, and what not.*

*Note*, One Defendant may plead the death of the other before the Writ purchased, or that there is no such person *in rerum natura*. 20 H. 6. 30. b.

But in *Replevin* if the Defendant avow upon an Estranger, the Plaintiff in the *Replevin* cannot plead in Abatement of the *Avowry*. 22 E. 4. 35. b.

If the Cognizee of a Statute sue execution against one Terretenant only without the other, he cannot plead in Abatement; but is put to his *Audita Quærela* against the other, because that the Cognizee is not bound to take Notice of all the Terretenants. 16 Eliz. Dyer 331. a.

*Nota*, That after a Continuance the Defendant

Defendant shall not be admitted to plead, that the Plaintiff was made Bishop, or, that the Woman Plaintiff took Husband depending the Writ, except that he pleads it after the last continuance: but it is otherwise of the death, or Coverture of the Plaintiff at the time of the Writ purchased, because these Pleas do abate the Writ *de Facto* 32 H. 6. 10. 11.

In a *Replevin* where the Plaintiff admits the *Avowry*, the *Priece* shall not plead in Abatement but as *Amicus Curie*; and not then except it be apparently known; *per totam Curiam* 34 H. 6 8.

In a *Præcipe* against *J. S.* the Son of *W. Edmond*, at the return of the *Grand Cape* the Defendant said, that his Father was named *Esmond*; and by *Thorpe* it is a good Plea, in Abatement of the Writ, before the default saved 40 E. 3. 2.

In a Writ of *Aiel Besaiel* and *Cofinage*, one shall not plead to the points of the Writ, after he hath pleaded in Barr; but it is otherwise in an Affise of Mortd'ancestor, as it seems. 40 E. 3. 19.

*Where the Writ abates in part by the Act of the Court, and where it is abated by the Parties own Confession.*

As if an Executor brings an *Action de clamore*,  
so

*so facto, & de bonis asportatis*, in this case the Writ shall abate for part, and as to the rest it shall be effectual.

But where the Writ is abated by the Plaintiff, it is reason (although that it be of his own Conusans) that if it abate, that the whole shall abate

In *Assise* against two, the one pleads in Barr as to a moiety, the other pleads jointenancy with a third person, the Plaintiff may choose him who pleads in Barr for his Tenant, and confess that his writ is false for the other part.

In *Assise* against two, the one is Tenant, the other is Disseisor; which Disseisor makes default, the other accepts his Companion Tenant with him, and pleads in Barr, the Plaintiff disables the Tenant and doth not answer to the Barr, for in this case he hath accepted a Tenant which is not Tenant. As if *Præcipe quod reddat* be brought by two where one is a Bastard, or by two persons as Heirs, where one of them in truth is not Heir; in these cases the whole Writ shall abate, because that that is meerly false which is supposed to be true.

Two Executors bring an Action of Trespas of Goods carried away in the life-time of the Testator, and also of Trees cut down; here the Writ is good, notwithstanding that the Executors cannot have the Writ for the Trees cut down, and if they pray to have

an other Writ for the Trees cut down then the whole Writ shall abate, *quod nota.*

*A Defendant or Tenant cannot abate a Writ by his Act; but the Act of the Plaintiff or Demandant and the Act of God, and also the Act of an Estranger may abate the Writ.*

In a writ of *Ravishment de gard* by the death of the Infant, the writ shall not abate.

Tenant by *Statute-Merchant* is disseised, the disseisor lets for life, the Tenant by the Statute brings an Affise, the Lessee dyes, the writ shall not abate, because he shall recover all in damages.

But it is otherwise where he is to recover the Freehold, because in that case he cannot have the effect of his Judgment.

A Writ of *Admesurement* of Common is brought by one against three, depending the writ, the Plaintiff and one of the Defendants exchange their Lands to which the common is appendant, if the writ shall abate? it seems not, because that notwithstanding the exchange, the Plaintiff may have the effect of his Suit, which is, that the Common may be admesured, and at all times pending the writ the Plaintiff and the Defendant who made the exchange were Tenants, and the Writ of *Admesurement* granted between them by reason of their Te-

nure, for there was no mean-time between the parting from the Free-hold in one Acre and the taking the Free-hold in the other Acre, and that very instant that the Free-hold of the one Acre was parted from the other was vested, so that there was cause of Admesurement between them as well after the exchange as there was before.

A Writ of *Admesurement* is brought against three, one hath nothing in the Common, so that the Writ ought to abate, because that non-tenure is a good Plea in this Action; yet if he that hath nothing before any exception be taken to the Writ purchaseth an Acre of Land by which he ought to have Common in the same Land, the Writ is made good. As in *Præcipe quod reddat* brought against him that hath nothing, and pending the Writ he purchaseth the same Lands, the writ is good. So it seems the writ is good notwithstanding no time between the exchange, *ergo à forciori* when there is no mean instant.

But by the better opinion it seems, that the writ shall abate notwithstanding that the party may have the effect of his Suit, for that ground is not absolutely general; as *Præcipe quod reddat* is brought against me, and I have nothing in the Land, and pending the writ the Land descends, the writ shall abate.

I bring an Action of waste by reason of the reversion, or a *Quid juris clamat*, depending the writ I alien the same Reversion, and after purchase the Reversion again, yet the writ is abated.

If a writ of *Partition* or *Nuper obiit* be brought, and pending the writ the demandant aliens and retakes the Estate to him, yet the writ shall abate. And yet in all these cases the Plaintiff may have the effect of his Suit.

But that which causeth the writ to abate is the Act of the Plaintiff, for the writ depending he hath aliened that which gives him his cause of Action, and therefore the writ shall abate as in the cases aforesaid: for as to the Plaintiffs part his own Act shall abate the writ, and not the Act of God, nor of the Law, except in some cases; and as for the Defendants or the Tenants part, his own Act shall not abate the writ, but the Act of God or of the Law may: for if the Tenant aliens depending the writ yet the writ shall not abate, but the Demandant shall recover, and he that comes in by the Tenant shall be bound by that Recovery. And if an exchange had been made by the Plaintiff with a stranger who had nothing in the Common, the writ should have been abated without question; So for that Acre which he had when the writ was brought,

he cannot maintain his writ ; for put the case, that the day the writ was purchas'd, the Plaintiff had not any Land by which he ought to have common, and afterwards pending the writ he purchas'd an Acre of Land to which the Common is appendant this shall not make the writ good which was nought from the beginning.

When the writ is made abatable by the Act of the Plaintiff or Demandant, *Videlicet* by his aliening of that thing which gives to him the cause of Action, if he pending the writ doth purchase the same again it shall not revive the writ, nor make it good.

**W** *Here the Grant shall be good ab initio although it was uncertain at the commencement.*

*Note,* If a Parson will Grant to me all the Wooll which he shall have for Tithe the next year to come, this Grant is good, and yet the quantity of the Wool is uncertain at the time of the Grant, But because it may be reduced to a certainty after the Grant, it was held good enough. 21 H. 6. 43.

And so, if a man will Grant to me the Perquisites of his Court, this uncertain Grant is good, *causâ quâ supra*, 21 H. 6. 43.

The



The same Law is, where a Feoffment is made of two Acres, the one for Life, the other in Fee, without determining in certain in which he shall have Fee, this incertain Feoffment may be reduced to certainty, as if the Feoffee loose both the Acres by default, he may have a *quod ei desorceat* for the one, and a *Writ of Right* for the other Acre, and thereby the certainty of the gift shall be determined and known. *Lit. Fo.*

13. 4.

And so, if one Grant a Rent-charge to one, now the Grantee may avow or have a writ of *Annuity*, and which of them he will use shall be maintainable, and yet at the Commencement it was incertain, and yet notwithstanding this incertainty the Grant was good. *Lit. Tit. Rents Fo. 13. 4.*

In like manner, if a man Grant to one 20s. or a Robe yearly, the Grantee there cannot know the certainty of the Grant; for peradventure he shall have alwayes the 20s. or perhaps alwayes the Robe, and yet the Grant there shall be held good, because that it is reducible to a certainty by the Will of the Grantor. 9 E. 4. 37 *en Dett. per Lit. Fo.*

13. 4.

And so, a Lease for so many years as *I. S.* shall name, is good, and yet it is incertain; but if *I. S.* name a certain number, then it is good *ab initio. Lit. ib.*

So, If I haue two Horses in my Stable, a black and a white, and I give to *I. S.* one of these Horses; now this gift is good notwithstanding the incertainty, because that by the circumstances, *Viz.* by his Election the certainty may be known. *Lit. ib.*

Also if a man Let all the Acres of Land which he hath in *Dale* to *I. S.* for years, rendring for every acre 12d. although that the number of the Acres were not known by the Lessor nor by the Lessee, and because the Rent is at the commencement incertain, yet upon mensuration or other Triall had, the Rent reserv'd may be known certainly, and then the Lessor may have a writ of Debt for the Rent, and so by this possibility of Tryall the reservation is made good, which at the commencement was void for the incertainty.

So if a man Lett Black-Acre and White-Acre for Life, the remainder of one of the two Acres in Fee, now it is incertain which of the two Acres he in the remainder shal have; but if he License the Lessee to cut down Trees in White-Acre, then he shall be adjudged to have had the remainder of that Acre *ab initio*, and so thereby that which at the commencement was incertain, is afterwards made certain.

And so was *Wheeler's* case, *sc.* one Grants his Term to another, upon condition that  
the

the Grantee shall obtain the Favour of the Lessor, and also pay so much as *I. S.* shall award; this was taken for a good Grant after the condition was performed. *14 H. 8. 17. 6. b.*

In *Trespafs* the case was, That the Defendant and the Plaintiff had bargained together that the Defendant should go to a place where certain Wheat grew, and to see the Wheat, and if he lik'd it upon the view, that then he should take it from thence paying 40d. for every Acre; this there was held a good contract notwithstanding the incertainty of the quantity of the Wheat, and of the gross Sum which should be paid for it, because that upon the circumstance the certainty may appear, for although it was a conditional agreement between the parties, yet it is held a good Justification if he presently paid for it at the time of his carrying it away. *P. 17 E 4. Fo. 1. & Fo: 6 b.*

*Able and Disable.*

*Reg. 1.* **S**<sup>*Fe*</sup> the diversity *17 H. 7.* where one *sc.* the Obligee was able at the time of the making of the Obligation and afterwards he is disabled by his own Act, and where he was not able at the time of the making of the Obligation.

For in the first case the Defendant shall be discharged, and if a man be bound to another by Obligation upon Condition, that if he pay to the Obligee an Annuity of 10*l.* at the Feast &c. Til he promotes him to a convenable Benefice, and afterwards the Obligee takes a Wife, or enters into Religion, the Obligor shall be discharged of the Annuity, because he hath disabled himself from receiving a Benefice. But if he be disabled at first when the Obligation is made, it is otherwise.

*Acceptance.*

**A** Man is bound to make a Feoffment of a Mannor to the Value of 20*l.* *per annum*, the Obligee accepts a Mannor to the Value of 10 *l.* he shall have advantage notwithstanding the Acceptance. 32 *H.* 7

*Action.*

Reg. 1. **W** Here the principal thing is devested, yet the Plaintiff shall have an *Action* which is acrued to him by reason thereof.

If I disseise one, and a stranger does Trespass to me, the disseisee reenters, I shall have an *Action of Trespass* for the Trespass before.

And

And so if a Lord does Trespass and afterwards recovers by *Cessavit*.

Reg. 2. **W** Here the Husband shall have an Action without naming his Wife, and where not.

If a man be disseised of Lands in right of his Wife, he shall have an *Affise* in his own name.

Also he shall have a writ of *Droit de gard* in his own name without his Wife, *Trin. 8 E. 3.*

The same Law upon an Obligation to Husband and Wife, the Husband shall have the Action without the Wife. *Trin. 12 R. 2.* And in 3 *H. 6.* adjudged that he might name his Wife if he would.

The same Law, if the Cattle of the woman be taken in the name of distress, and I Marry her I shall have *Replevin* in my own name. *Mich. 32 E. 2.*

Also of the disturbance of Advowson which a man hath in the right of his Wife, he shall have a *Quare impedit* in his own name. *Pasch. 7 E. 4.*

If a man be bound to a woman, and afterwards she takes Husband, both shall have Action. 11 *H. 6.*

The same Law, if a man be Receiver to a Feme sole, and afterwards she takes Husband, both shall have an *Action of Account*. *Trin. 9 R. 2.*

Where

Where the Husband and Wife recover seisin of the Land and damages, for the damages, they shall join in the Action.

The same Law if a Feme sole makes a Lease reserving Rent, and afterwards takes Husband, they shall joyn in an Action for the recovery of the Rent. 7 E. 4.

A writ of *Droit de gard* as of the right of the Wife ought to be brought in both their names, because it concerns the right and not the possession, by *Choke Anno predicto*.

If the Beasts of a Feme sole be distrained, and she takes Husband, the Husband Sues a *Replevin* in his own name, it seems the Action does not lye; for in every case where the cause of Action is given to a Feme sole and not to the Husband, the Husband ought to joyn his Wife with him, as if a contract be made with a Feme sole and she takes Husband, &c.

So it is of a Lease for years made by a Feme sole reserving Rent and She takes Husband.

So of an Obligation made to a Feme sole and she takes Husband; for otherwise the words of the writ are false.

But if a Feme sole make a Bailiff of her Mannor of Dale, and takes Husband, of all the Rent received by the Bailiff after Coverture,

verture, the Husband shall have an *Action of Account* in his own name, for there the words of the writ are true.

And when an *Action* personal is given to the Husband and also to his Wife during the Coverture, it is at the Liberty of the Husband to bring the *Action* in both their names or in his own name, if it be so that the Wife may have advantage of it.

When a thing is given to Husband and Wife by matter of Record, then he ought to joyn with her.

But there is a Diversity when it is of the part of the Plaintiff and when it is on the Defendants part, as a Feme sole disseiseth me and takes Husband, the *Assise* lyes against both, supposing that they both disseised me. So it is of *Trespasse*.

*Note*, It is at the Election of the Plaintiff to bring his *Action of Debt* against the Heir, or against the Executors.

A Man marrieth a Wife, That hath a Rent Charge out of the Lands of another, Rent is arrear before and after marriage; The Plaintiff shall recover by *Action of Debt* against the Grantor or his Heirs.

*Action of Covenant* shall not go to the Heir but to the Executors, As *Action of Debt* upon a Bond or a Lease for years, the Term goes to the Executors and not the Heir, or any thing where damages shall be only recovered

covered ; for that every Heir may not have Chattels descend, and so not this Action.

A man seized of a House and Goods makes a Lease thereof, and after enters and enfeoffs *J. S.* the Lessee reenters ; Rent is in arrear ; *J. S.* brings his Action of Debt, and hath Judgment, because the Rent issues out of the House , and not out of the goods.

A man was bound in a Bill *Me teneri & firmiter obligari in viginti libris solvendum in watches.* It was questioned whether the Action should be brought for the Watches or the Money. But Resolved for the Money ; Otherwise if the number of Watches had been in the Bill : For then it had been for so many Watches to the Value of 20 *l.*

If a man had been indebted to me in a single contract and dyed, I could have had no remedy at the Common-Law against his Executors ; For he might have waded his Law in his Life-time, but his Executors could not. But now I may have an Action upon the Case against his Executors.

Assault and Battery and Ejectment will lye both in one Declaration. Where two Men are beaten together, yet they ought to have several Actions, because the Trespass is personal ; but otherwise it is in real trespasses.

If you bring your Action for live Cattle,  
it



it must be *Cepit & abduxit* But if it be dead Goods or Chattels, then you must say *cepit et asportavit*: so likewise you say for live Cattle *pretii*, for dead things *ad valentiam*. Divers persons may have an Action of Trespass joyntly for Goods taken, or the like; But of Battery or such personal Trespass the Action ought to be single, unless it be a man and wife. And if the man and wife bring an Action of Battery or for Goods taken, The writ shall say the Goods of the Husband only; For the Wife cannot have property in the Goods during the Coverture.

An Action lyes against an Executor upon a promise of the Testators, upon consideration of forbearing to prosecute; but altered since by the late Act to prevent Frauds and Perjuries.

If there be Three Executors named in the Testament, and Two of them refuse, the Third may prove the Will alone; And yet the other Two may meddle with the Goods when they will, and either of them when they will: And if an Action be brought, it ought to be in all their names, notwithstanding such refusal,

Executors of Executors shall not have an Action of Debt or other Action for any thing due to the first Testator, For that they are not Executors to the first Testator or privies to his Will, but were Strangers by the Course

Course of the Common-Law. But by the Statute of 25 E. 3. Cap. 5. they may Sue and be Sued, and shall answer for whatsoever comes to their hands of the first Testator.

Sr. O. C. seized of an House in Fee, and possessed of an other House (as Administrator) for years, Lets them both for 10 years to the Lady S. who Covenants to keep them in Repair, and so Leave them at the end of the Term. Afterwards Sr. O. grants the Reversion of both Houses by several Indentures to J. P. The Lease made to the Lady S. expires, and the Houses are left Ruinous; Whereupon J. P. brings his Action. *Nicholls* for the Defendant said, *that the Plaintiff ought to have brought two Writs of Covenant, for that the Houses are several; and if (the Case had been) that the Lessor had Covenanted to repair them, and had dyed, yet the Lessee should have had one Writ against the Heir, and another Writ against the Executor; and when an Action is once severed, it can never be joyned again: and when Sr. O. hath granted the House of which he was seised in Fee by Deed to P. now the Action is severed, and Sr. O. shall have an Action of Covenant for one House, and P. for the other. And for these Reasons he held the Action not to be well brought. Doderidge è contra. And first he agreed with the other that two Actions upon this Covenant are maintainable, and that if Sr. O. had lett his*

his House the Lessee shall have one Action upon this Covenant, and the Lessor another; But yet he said this Action will well lye, for the Law is excellent in this Point, for when the Ground upon which the Action is founded in one, notwithstanding the things are several, yet all shall be comprised in one Action, for, frustra fiunt per plura quæ fieri possunt per pauciora, and with this agrees 14 E. 3. If a man grant a Rent out of his Land to one, and sells the same Land, and afterwards the vendee grants another Rent-charge out of the same Land to the same person, and he is disseised, He shall have one Assise for both the Rents. So if one distreyn for two Rents and the Tenant rescues them, He shall have but one Writ of Rescous, 3 H. 6. 17. & 13 H. 7. 12. b. There exception was taken, because it supposed a Chasing in two Parks, the which ought to have several Punishments, Viz. for either Park Imprisonment for 3 years, as it is given by the Statute W. 1. and because he joyns the chasing in two Parks together, it is not good; For a man cannot have a Writ of Ravishment de deux Guards, nor Quare impedir of two Churches. Yet by the Judges it was held good enough, as of Trespass's, for a man may joyn Lands of twenty Titles in Trespass; and Trespass lyes f Wood, Pasture and the like: and 4 E. 2. if a man hold Lands in Capite and dye, having issue only two Daughters within

within age, and they are ravished, the Lord shall have but one Ravishment de Gard. and 31 H. 6. 14. if a stranger enters upon two Parceners, they shall have but one Formedon; and if the Lessor shall have one Writ of Covenant for those Houses, the Assignee shall have the same; For the Statute of 32 H. 8. ca. 14. gives the Assignee the power of the Lessor; And the Lord Chief Justice Coke said, If a man seised of Lands in Fee enfeoffs an other to the use of himself for Life, the Remainder of part to one of his Daughters and the Heirs of her Body issuing, the Remainder of the Residue to the other Daughter and the Heirs of her body issuing, the Eldest Daughter dyes without Issue, a Stranger enters upon the whole, the other Sister shall have but one Writ. Mich. 8. Jacobi in Communi Banco inter Pyot & dominam St. John.

If an Infant Lets Lands for a Term of years rendring Rent, he may at his Election have an Action of Debt for the Rent reserved upon the Lease, or bring Trespas for occupying of the Land, and so he may have an Action of Trespas for the use of of a thing sold by him. And if an infant do give an Horse to one without actual delivery of the Horse into his hands at the time of the gift, and the Donee taketh the Horse by reason of the gift, the Infant may have an Action of Trespas against him. 18 E. 4. 2.

If an Infant makes a Lease for years ( or a Lease *per dures*) if the Lessee enter, the Infant may have an Assise; but if the Infant makes a Feoffment and deliver seisin accordingly, he shall have no Assise; for by the Livery of seisin the Feoffee had a possession at Will at least; but if he makes a Letter of Attorney to deliver seisin, he may have an Assise. 9 H. 7. 24. 8. 2. Mar. 109. Dyer. Rug. Case.

If an Obligation be made to Husband and Wife, the writ may be brought in the Husbands name only. 12 R. 2. Breif 639. And so,

Where a Lease for years is made by Husband and Wife, of the Lands of the Wife, rendring Rent, the Action of Debt must be brought in the name of the Husband only, 7 E. 4. 5. But by 2 R. 2. in a Writ concerning a Chattel real, they may joyn. 2 R. 2. Breif 37.

As to such things which concern the person of the Wife immediately, there the Writ must be brought in both their names; And therefore,

The Husband cannot sue a Writ of Appeal for the Rape of his Wife, without naming the Wife. 8 H. 4. 21. 1 H. 6. 10 H. 4. Brook Baron & Feme 34.

Husband and Wife brought an Action of Battery for the beating of them both, the

D

Writ

Writ was adjudged good for the Battery of the Wife, but not as to the Husband. 9 E.

4. 54.

The Husband and the Wife shall both bring an Action of Trespass for the taking away the Goods of the Wife before Marriage. 21 H. 33.

In a Writ of *Detinue of Chartres* against Husband and Wife, Declaration was upon a *Trover*, and the Writ was abated. 13 R. 2. *Breif* 644.

A Writ of *Covenant* was brought by the Husband and Wife, for that the Defendant had Leased to them Lands by Deed for Term of years, and afterwards ousted them; and the Writ was adjudged to be good; for if the Husband dyes, the Wife shall have the Term, and in this Case they were both parties to the Covenant. 47 E. 3. 12.

An *Action of Debt* for the arrearages of Rent reserved upon a Lease for years made unto the Husband and the Wife, shall be brought against them both; and so shall a Writ of *Wast*: for the Wife cannot waive the Lease during the life of the Husband. 6 E. 4. 10 & 17 E. 4. 7.

An Action upon the Statute of Laborers was brought against Husband and Wife, supposing that the Wife had Covenanted with the Plaintiff to be waiting-woman to his Wife for a year, and that she departed out

out of service within the year, and the writ was adjudged to be good being brought against them both, 8 R. 2. Laborers. 59.

A man may have a writ of *Detinue* of Charters and of Chattels joyntly, because there one thing is the ground of the Action, viz. the Deteyner. 44 E. 3. 41 Breif 583.

Likewise a man may have a writ of Debt where part of the Debt is due by Obligation and part by Contract, because there the Debt is only occasion of the suit. 41 E. 3, damage 75. 1 H. 5. 4.

So in things of the like nature one writ may comprehend many wrongs; and therefore an Action of the Case was brought for hindring the Plaintiff to hold his Leet, 2. for the disturbance of his Servants and Tenants in the gathering his Tithe, 3. for Threatning so that the people &c. durst not come to a certain Chappel to do their Devotion, and present their Offerings, & 4. for the taking of his Servants and Chattels. 19 R. 2. Action sur le Case 52.

When an Action is given by the Statute, and the Statute doth not prescribe any certain form of the writ, the writ framed at the Common Law shall serve for that purpose, and the special matter shall be set forth in the Declaration. Dyer 37. 4. 83.  
6.

*Where a man shall have an Action against his own Deed.*

A man shall have an Action against his own Deed, as if I disseise an Abbot and make Feoffment in Fee with warranty, and afterwards I am made Abbot of the same House, my Feoffment shall not be a Barr to me, notwithstanding it was with warranty; I shall have an Action against my Alienee, because that I recover to the use of the House and not to my own use.

The same Law, if I disseise Major and Commonalty &c.

The same Law of the Parson of a Church.

The same Law if I take a Horse of a Feme sole and Sell it, and afterwards marry her, I shall have an Action of Debt against my Alienee, because that I recover to the use of my Wife, *tamen quare.*

A Monk shall have a *Quo minus debitum Domini Regis solvere non potest* for the advantage upon a Lease made by the King reserving Rent, 14 H. 4.

The same Law if a Villein be made executor to a man to whom the Lord is Bound, the Villein shall have an Action against his Lord.

The same Law if a Monk be made Executor &c.

The



The same Law if an Abbot hath been disseised, and afterwards the disseisor is disseised, the Disseisor releaseth with warranty and after that is made Abbot, he shall find against his own Deed &c.

The same law if an Abbot make a Feoffment in Fee, and afterwards is deposed and sometime after is made Abbot, now he shall have an Action against his Deed which he himself made when he was Abbot, because that now he comes in as Successor, and not in the place as he was before.

The same Law of Warden and Schollars.

But it would have been otherwise, if he had disseised a Parson, and made Feoffment in Fee with warranty, or without warranty, and afterwards is made Parson, now if he will use an Action, his own Feoffment shall be a Barr against him, because that all that he shall recover by this Action is to his own use.

The same Law if a man disseise a woman, and makes a Feoffment in Fee, and afterwards he takes the woman to Wife, in this case the Husband shall be Barred, because that he will have advantage of this Recovery to his own use.

If a man hath right to have Land where his Entry is tolle, and releaseth to the Tenant

all manner of Actions, and dye, his Heir shall have his Action and recover the Land, because that by such release no right is extinguished; and if the Tenant makes Feoffment in Fee or dyes seised, he that made the release shall have his Action against the Heir of the Tenant or his Feoffee against his own release, and the cause is, because that nothing is released but his Action against the same person, and not any right.

If the Son disseise his Father, and make a Feoffment with warranty or without warranty, and after his Father dyes, he cannot ouste his Feoffee because that it was his own Deed.

*A man hath good cause of Action sometimes, and yet by matter ex post facto and by the Act of a Stranger his Action is destroyed.*

As I am disseisee and he is disseisor, and I release to the disseisor.

Also I bail or lend Goods to one, a Stranger takes them, the bailor sells them to a Stranger &c.

Action of Debt upon an obligation brought by an Executor, the writ shall be *detinet* and not *debet*, and for this cause they joyn in the same Action for an Horse delivered by themselves to the same Obligor.

The same Law, if a man recover Lands  
by

by default in which I have an Estate for life, and he recovers by another writ by default Lands wherein I have an Estate Tail, I shall have a *Quod ei deforceat*, because the conclusion of the writ serves me. And so a man may joyn two or three things in his Action where the conclusion of his Action is pertinent to the several matters and doth not vary.

If two or three Acres are given severally in tail, and the party discontinue the whole, his Heir shall have Formedon for the whole, because that the writ is *le quel un I. dit S. dona*, and although the Acres are given severally, that is not material, forasmuch as the common Writ will serve in this case.

But if the Acres are given by divers or several men, or that the one shall be given to the Heirs Males, and the other to the Heirs Females, and the third to the Heirs General, in this case the Heir shall have several writs, and not one writ, because that one writ cannot serve for such several Gifts.

If I deliver Goods to one who is indebted to me, and he dyes, against his Executors I may have a writ for the Goods and for the Debt, because that the writ is against the Executors for the Debt in the *Detinet*, and for the detinue it is in the *Detinet*, and therefore the writ well warrants the count to de-

clare partly for debt and partly for Detinue; but such an Action he could not have had against the Testator, because that for the debt against him the writ ought to have been in the *debet* and *detinet*.

A Feoffment is made upon condition of payment by the Feoffor, he commits Trespass, and afterwards enters by force of payment &c. yet the Feoffee shall have Trespass because his possession is affirm'd. 43 E. 3.

*Assumpsit*, If he would relinquish such a debt to pay him 30 l. and sayes he did relinquish it &c. and after Verdict for the Plaintiff, Judgment stayed because he shews not how he relinquished it and it may be by parol which were void. *Gregory versus Lovell*. 3 Cro. 292.

*Assumpsit* in Consideration he would discharge him from an Arrest; and sayes, that *exoneravit ipsum*: moved in Arrest &c. he shews not how he discharged him *sed non allocatur*; for they might be per parol for a time but in Pleading a discharge of a Rent or bond which must be by Deed and perpetual, it must be shewed how, *King versus Hobbs*. 2. Cro. 930. 960.

*Assumpsit*, the Defendant pleads the discharge of the promise, whereof Issue taken and found for the Plaintiff, and divers defects in the Declaration, moved in Arrest of Judgment; but by *Wrey* all these defects tending

tending to the *Assumpsit*, are cured by the collateral Plea. *Manwood v. Buxton*. 2. *Leond.* 203, 204.

*Assumpsit*, If he would make it appear &c. and sayes he made it appear by the Court-Roll, Good, without saying what the Court Rolls were for the Infinitly. So a Bond to save harmless from all Estreats, good, without shewing what, for the same reason, *Vide* 9 *E.4.* 15. a. 22 *E.4.* 41. a *Mo.Pl.* 1175. 3 *Cro.* 149 *Pl.* 3. 919. *Pl.* 3. 3 *Bulst* 31. *Latch* 130. *H.* 2. *H.* 7. *Pl* 22. *H.* 6. *H.* 7. *Pl* 8. 8. 22 *E.4.* 15. a b. 28. b. 29. a.

Assumed he would assign Goods to pay &c. and sayes he assigned, and shews not how, but *per scriptum* yet good; Note, after verdict. *Forth v. Yates Tr.* 20 *Car.* 2. *B R.*

*Assumpsit* against an Executor, who Pleads *solvit* to such a one on a Bond of 100 *l.* and to another 100 *l.* on a Bond, and so to divers others which he was forced to do, the Payment being *post exhibitionem Bille*, and Pleads a Recognizance in force not satisfied; the Plaintiff Pleads *non solvit* to such a one 100 *l.* nor to such a one 100 *l.* *Et si de ceteris & hoc petit* &c. and to the Recognizance, that it was satisfied and kept in force of Fraud; the Defendant demurred *quia replicatio* multiplied and double, consisting of two matters, where one goes to the whole, but  
Judgment

Judgment for the Plaintiff; for the first objection to one 100 *l.* to another 100 *l.* make several Issues though *que de hoc*. And in case of an Executor one may answer to every thing alledged by him. *H. 21, 22. Car. 2. B. R. Jeffreys v. Dod.*

*Assumpsit* to permit Land to descend, breach laid *quod non permisit*; well, being in the negative, but in the affirmative it ought to be shewed how disposed, though they could not descend. *H. 9. Jac. B. R. rot. 3 Bulstr. 18.*

*Assumpsit* to perform an Award, and sets it forth; the Defendant pleads that they did not Award *modo et forma, &c. Et hoc paratus, &c.* ill; there he should have concluded all *pais*. And on general demurrer *ibidem* where an Award was, That one bound with Sureties, assigns breach that he did not become bound *modo et forma &c.* well, though the Award bind as to the Surety, 'tis good as to him. A breach assigned that he did not &c. and the *modo et forma* extends not to the Surety, but to himself only, though it be made *modo et forma* as Awarded. *Cooke versus Whorewood H. 22, 23. Car. 2. B. R. rot. 116.*

*Assumpsit*, If he would abate Ten Pounds and forbear the 90 *l.* till *Michaelmas* to pay it, and declares, that he abated the 10 *l.* but shews not how; but held ill on demur-

rer per tot. Cur. Thornton v. Kempe. 3 Cro. 477.

In Conspiracy the Defendant justifies to carry in the Presentment found in a Leet before the justification, and though there is no Conspiracy, yet he must plead *que est eadem Conspiratio*. P. 27 H. 8. Pl. 6.

Conspiracy, the Defendant pleads, the Plaintiff has another Writ, depending for the same; the Plaintiff replies *nul tiel record*; and so 19 H. 6. 57. 4. Pleads, that he removed; the other Pleads *nul tiel Record* of the removal. 9 H. 6. 14. 4.

## Amendment.

**I**F an Original Writ be defaced, it may be Amended at the discretion of the Justices. Hill. 25 et 26. Car. 2. B. R.

The Clerk in the Kings-Bench may amend the Roll until a *Recordatur* be thereof made either in Writ of Error, or by rule of Court. Trin. 26 Car 2. in B. R.

A Note was brought to a Clerk to make an Obligation, who for *milite*, writ *generoso*, upon which the Process issuing, the Plaintiffs Counsel came and prayed that this Misprision of the Clerk might be amended; and upon mature deliberation all the Court agreed, that it should be amended, and the Lord Chief Justice said,  
That

That at the Common Law no Original might be amended in this Court before the Statute of 8 H. 6. ca. 12. Which Statute enables them to amend only Misprision; that is, when the Clerk takes one word for another, or where he writes a Latin word which is not Latin or false Latin, as *hos breve*, for *hoc breve*, 9 H. 7. 16. b. or *imaginavit* for *imaginatus fuit*; Benlowes Reports, fo. 19. or in a Writ of Partition to say *Ostensus quare non fuit*, for *fuerit*, or *Henricus dei gratia* &c. when *dei gratia* should not be in the Writ; or if it be matter of Form, as *Præcipe quod solvat*, for *reddat*, 22 E. 4. in all which Cases last cited, there shall be no amendment. And the Lord Chief Justice Coke said, *That if the Defendant had been sued to the Utlary, he would not have amended it*; but the Principal not being so, it was amended. [See 11 H. 7. 2. 10 H. 7. 25. 11 H. 7. 1. & Co. 8. Blackmores Case, 156.] Mich. 8 Jacobi Regis in Communi Banco.

If one makes an Obligation, and Seal and deliver it and mistakes the day; yet by Coke Lord Chief Justice, it is good. Mich. 8. Ja. *ubi supra*.

If the Teste and the Return of a *Venire facias* be both upon one and the same day, it is no Error, (although the Teste ought to bear date Fourteen days after) but shall be amended; and 7 E. 4. a *Venire facias* was returnable



retornable *Menſe Michaelis* ; whereas it ſhould have been *Oſtabis Michaelis*, and the Jurors appeared ; It was agreed by the whole Court, That it ſhould be amended, and that Error did not lye thereof. Co. 8. *Blackmores Caſe*, fo. 156.

After Verdict in *Ejectione firma*, theſe Errors were alledged in Arreſt of Judgment, That, where the Declaration was *prout prædictus Willielmus*, which ſhould have been *Johannes. 2. prædictus defendens ſimiliter, ponit ſe ſuper patriam*, which ought to have been *querens* ; Theſe are not Errors, but Miſpriſions of the Clerk, which by the Judgment of the whole Court ſhall be amended. So 11 H. 7. 2. b. per Brian prædictus defendens &c. was amended, and 10 H. 7. 23. b. per *Townſend*, a Barr was pleaded by the Tenant, which concluded with prædictus *Johannes*, is ready to averre &c. where it ſhould have been *Rogerus* ; It was amended by the Advice of all the Juſtices, and Coke Lord Chief Juſtice ſaid, That Miſpriſions were amendable at Common-Law in the ſame Term ; for during the Term the Record is in *peſtore Judicis*, as 1 H. 6. 29 in *Brooks Abbridgment*, Title *Amendment* 32. if Judgment be entred in the King's-Bench or Common-Pleas otherwiſe then it is in Truth ; Or if *Tales* be awarded and marked on the back of the Writ, or of a Scrowl, and not entred

tred on the Roll, All these things may be amended in the Term ( and the reason of the Book is ) because that the Record is in the Justices, and under their care the same Term, and not esteemed to be on the Roll so absolutely, but that they may amend the same at their discretions ; for they do not account it a Record until the next Term : And this Amendment is by the Common-Law, and not by the Statutes of Amendment of a Syllable or Letter. And *per Cheine, ibid.* The Justices of the Common-Pleas after a Writ of Error cannot at all amend the Roll where a Judgment was given the same Term, and is mistaken in the Entry, because the Roll is not a Record of that Term. And herewith agreeth 5 E. 3. That this was so at the Common-Law until the Statute of 14 E. 3. came, which gives Power to amend process in the other Term ; and after 46 E. 3. the Case was, *Et prædictus defendens similiter*, whereas it ought to have been *Querens*, but it was not amended, because it was an old Roll, and the Statute gives Authority only for New of the same Term they are Entred ; and then was made the Statute of 26 H. 8. which gives power to amend a Plea Roll, but no Omissions can be thereby amended but Misprisions only. *Mich. 9 Jacobi in Communi Banco, Weeks versus Blackfeed. Lessee de Cambden.*

A *Venire facias* in Ejectment is awarded to the Sheriff, wherein the Plaintiff is named *J. P.* the Jury is returned and give their Verdict by his true name *viz P. P.* and so is the *Posita*. The Court said, If the Record be true, and not the Process, it may be amended as a Misprision of the Clerk; but *contra* if the Record be false and the Process true, but in the principal point the *venire facias* was void, and therefore they would advise upon it. *Mich. 10. Jacobi in C. B. Peirce versus Milton.*

In *Quare impedit* the Writ was by the Misprision of the Clerk *Bicaria*, where it ought to have been *Picaria*, and it was amended. After a Writ of Error brought in the Kings Bench, Serjeant *Hutton* moved that the Warrant of Attorney might be amended where the Christian name was omitted, but entred in the Clerk of the Warrants Office upon the Statute of 38 *H. 6.* and it was amended. *Mich. 14 Jacobi in C. B.*

A Judicial Writ shall be amended by the Record, because it came from thence. *Pasche 15 Jacobi in C. B.*

The Original Writ is *primo Martii*, and in the Declaration it is *primo Maii*, it is void; for there is no such Record, and it cannot be amended, because the Count cannot be amended. 4 *E. 4.* and *Coke* Chief Justice said, That a Judgment given without an Original

original is not void, but voidable. *Mich. 10 Jacobi ubi supra.*

Misprision shall be amended by the Statute of 14 E. 3.

As upon Variance between the Count or Declaration and the Writ, if it be in default of the Clerk, it shall be amended.

The same Law, if an *Exigent* be awarded returnable *Ostabis Michaelis*, and the Roll is *Quindena Martini*. 7 E. 4.

The same Law, in Trespass the Parties were at Issue, and *Venire facias* and *Habeas corpora* were served, and *Distringas* awarded with *Nisi prius*, the Roll was *Quindena Martini*, and the Writ *Mense Michaelis*, at the day *in pais* the Justices took the Enquest, notwithstanding that it was brought without Warrant, the Writ of *Nisi prius* shall be amended. 7 E. 4.

The same Law, *Ravishment de gard* was brought against one *Banaster*, and the Process was *Vanastr*, and for that it was amended. *Mich. 4 H. 6.*

The same Law, if the Roll varie from the Original, the Process &c. 19 H. 6.

Amendment is properly where there is default in the Clerk, as where a man shews an Obligation to a Clerk of the Chancery, and the Clerk doth not make a good Original upon it, now it shall be amended because the Clerk had sufficient Instructions :  
but

but it is contrary if he shew the Clerk only a Copy of the Obligation.

The like Law if a man brings a *Formedon*, and these words, *quam clamat esse jus et hereditatem suam*, are omitted, there the Original shall be amended, for the Clerk ought to look to his Register, and there he might see in what Form he should make the said Writ.

So it shall be where the Original is good in any case, and the judicial Process naught; it shall alwayes be amended; for it appears to be wholly the default of the Clerk.

The like Law shall be, in Trespass the Defendant pleaded *non cul. et ponit se super patriam*, and the Clerk entred it *Et def. similiter* where it should have been, *Et predictus querens similiter*; this shall be amended, because it appears that the default is in the Clerk, as in other cases before.

But where no default is in the Clerk, otherwise, as if in a Plea, that matter which he would averre be omitted, it shall not be omitted, it shall not be amended, for it is part of the Plea.

The like, if a Colour be omitted in a Writ of Trespass or Assise. And so see the diversity.

In Assise brought against two or three where one is Tenant and the other is Disseisor, the Tenant takes the Tenancy upon

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him

him and Pleads in Barr, now if the Plaintiff makes Title and Traverseth the Barr, and concludes, *et issint fuit il seise tanque per les trois disseise*; this Plea is not good, for he ought to maintain his Writ, and there he shall have it *pro falso clamore*.

So it is in Tretpass, a second *Capias* is awarded, and then an *Exigent*, the Defendant appears upon the *Exigent* and shews the matter, now the whole Process is discontinued and shall not be amended, for it was the fault of the Party, for he ought to pray his Process at his peril, and then the Office of the Clerk is to make it as it should be &c.

So if Summons be awarded in *Precipe quod reddat*, and afterwards a *petit cape* or *grand Cape* be made, it shall not be amended for the cause rehearsed.

A Judgment given in a Writ of Annuity was reversed, for that the Writ of Annuity was *Precipe quod reddat 26 marc' 6d 8s que ei aretro sunt de annuo reddit' 4 marc' per annum*, and the Count the 6s 8d were left out; and because that there was a disagreement and it is the warrant of the Writ, it was reversed, for the Count is by the Party and not by the Clerk. 9 E. 4.

*Venire facias* was made *Vicecomiti*; but *Salop*, was omitted, and the Sheriff of *Salop* impanelled the Jury, and it was amended

*Appearance.*

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a Tryal, and diversity taken whereby special Plea the issue shall be of another County, and the Award of the *venire facias* special, there it shall be ill: but where upon general Issue or within the same County the Award is *fiat inde Jurata*, there it shall be amended. *Telvertons Rep. Lee vers Lacon* 69. and 2 Cro. 73.

*Appearance.*

**A** Man is Arrested upon mean Process; and gives Surety to the Sheriff by bond to appear, and after *Supersedeas* comes to the Sheriff before the day of appearance; Yet the Defendant ought to appear, otherwise the Bond is not saved.

By the Statute of *W. 2.* a man of 70 years old shall not be amerced for not appearing upon the Jury. *per tot. Cur. Mich. 9 Ja. in C. B.*

*Annuity.*

**A**N Annuity is granted *pro consilio impenso et impendendo* to one *Plumer* an Attorney; There is a Suit depending between the Grantor and a Stranger; The Attorney gives Councel to the Stranger, That is adversary to the Grantor, But it is not required to give Councel to the Grantor in

that Cause; Whether this was against the effect and intent of the Grant aforesaid; And it was held not, by the Court, and that the Annuity should continue.

*Note*, in Annuity it is not necessary to express in the Declaration the Estate of the Grantor, but only to say, That the Grantor did grant the Annuity. *Co. Entr. Fol. 49.*

*Arbitrement.*

**D**Ebt upon Obligation or upon arrears of account cannot be put in arbitrement with other Trespasses or such like, notwithstanding the submission be by Deed; but it is otherwise of a contract; *quod nota.*

Arbitrement is not good except that the party can perform it without the aid or licence of an other, as if Arbitrators award, that the one Party shall enfeofee the other of the Mannor of *D.* of which *I. S.* is seised, this is a void Arbitrement, and yet it is possible, for he might disseise *I. S.* and make Feoffment &c. or might purchase the Mannor of *I. S.* and thereof make Feoffment according to the Award, but the party shall not be charged with these mischiets and therefore the Arbitrement shall be void. Otherwise it is, if the Award was, that one of the parties shall Enfeofee the other of the Mannor



Manner of *D.* generally, without speaking of *I. S.* that he is there compell'd to make Feoffment thereof. And so note the diversity where it appears upon the Award, and where not.

Further, if the Award be that he shall go to *Pauls* with an Estranger, this is void, and yet it is possible, but peradventure the Stranger will not go with him.

*Note.* if the Award be that one of the parties shall deliver to the other the Goods that is in the house of *I. S.* this is void, and yet it is not impossible, but because that he might do wrong to *I. S.* to enter into his house and to convey his Goods from thence.

But if the Property of the Goods be in the party that is to perform the Arbitrement peradventure it may be otherwise, forasmuch as his Entry is lawful.

*Audita Querela.*

**A** Statute is Acknowledged before the Major of *Westminster* and Recorder of *London* according to the Statute; The Cognizor being within the age of one and twenty (*viz.*) 20 years and upwards; And after his full age to the 23<sup>d</sup> he brings his *Audita Querela* upon this matter and Judgment, that he take nothing by the Writ, because it could not then be tryed by inspection,

whether he were within age or not; And the form of the Writ in the Registrors is to alleadge that he still is within age.

*Audita Querela* lyes upon *Nihil facias*, but not upon *Scire facias*, 21 E. 3. For *vigilantibus et dom dormientibus subvenient Leges*, per Hutton, Mich. 11 Jacobi in C. B.

The Executor of the Conufee releaseth to the Conufor in a Statute Merchant, and afterwards dyes, and one takes Administration of the Goods of the Conufee not Adminiftered, and hath Execution of the Statute, and againft him the Conufor brings an *Audita Querela*. Trin. 28 Eliz. rotulo 2136 in C. B.

*Avowry*, vide *Replevin*.

**A** *Vowry* for an Amerciament in a Court Baron *quia presentatum fuit*, that he was Summoned and came not, and alleadges in fact, that he was resident &c. as he must &c. for when tis only *presentatum* &c. and not alledged in fact, tis ill. *Mo. Pl.* 221.

In *Avowry* it was fet forth, that a Dean and Chapter were feised in *Jure Ecclesie*, and not laid feized in Fee, and held ill: for they might be feized *per auter vie*, and their Title ought to be certainly fet forth, and this is but that they made a Lease for 99 years, *per dodrige* if it had been that they made a Lease for 200 years, it had implied a Feoffment in Fee *Pop.* 163. *Latch.* 121. *Avowry*

*Avowry for damage feasant*, and shews a Lease from *J. S.* seized in Fee: the Plaintiff says *J. S.* was seized in Tayl, and conceives the Estate to himself as Heir; the Avowal seizes the Land rendring Rent, and that he had accepted it, *Qu.* If it be not a departure. 1 *Inst.* 304. It seems a fortifying of the Avowry, and so not, *Sti.* 41. *Taylor's Case*, *Yelv.* 134. *Wood versus Hawkshind.* i. *Cro.* 156. 2 *Cro.* 121. 3 *Cro.* 404 *Dy.* 956. 1 *Inst.* 304 *Hob.* 271 *Dy.* 103. 253 *b. Yelv.* 96 *Leon.* 32. 156.

*Avowry on a New Grant of a new Rent-Charge in Fee*, the Plaintiff pleads, that nothing passes by the Deed; 'tis an ill Plea, he should have said that he did not grant by the Deed; for a thing not in *Esse*, could not pass though it was raised by the Deed, *Stewards Case.* 2 *Leon.* 13.

*Avowry by an Executor for Rent reserved by her and her Husband upon a Lease for years derived out of a Lease*, Exception taken, because not shewed when the Husband dyed, so it appeared not due in his time but because all belongs to her, one way or other, *Wellwood in Newman. Latch* 121 *Pop.* 163.

Costs to the Avowant upon 7 *H. 8. c.* 4. *vide Common et Commoners, Sect* 4.

Costs given to the Avowant for Damage-feasant, by 21 *H. 8. c.* 19. *Cro.* 1. *James vers Tutneg* 532.

*Replevin* against 3, the one Avowes, and the other 2 makes Conusance, and Judgment against the Plaintiff; but reversed, because that those two did not make Conusance as Bailiffs to an other. *Talv. Owen vers Williams*, 108.

The Lord hath still his choice to avow as at the Common-Law, but if he will take the Benefit of the Statute, then the Privy on both sides is removed, and the Tenant shall Plead any discharge though he be a meer Stranger; for the Charge of the Land is only in question, though in that Statute 21 H. 8. there be no literal Provision so to be. *Hob. Brown vers Goldsmith* 108.

Avowry for 5 l. and 80 l. *nomine pana*, no demand of the Rent was alledged, which made it insufficient for the penalty; but Retorne adjudged to him, for they appeared to the Court to be several. *Hob. 133 Haw-el vers Sambark*.

If the Donee Alien, the Donor cannot Avow upon the Alienee *Keilway*. 130. b.

Prescription, that if one be chosen Constable at the Leet he must serve himself, or find a sufficient man to do it; and the Avowant saies, that the Plaintiff was chosen; and did not find a sufficient man to serve; upon which it was demurred, and Adjudged, That the Avowry was ill. *Escot vers Stokes*. 14 Car 2. in B.

One who is a Stranger to the Avowry shall not Plead any Plea but *hors de son Fee*, or some other which is *Tantamount*.

As Lord and Tenant, the Tenant makes a Lease, the Termor shall plead no Plea but *hors de son Fee*, because that he is a Stranger to the Avowry, and he cannot have a Writ of *Mesne*, because it is a *Maxime*, Where a man cannot be helped by way of Action, he shall be aided by way of Reversion.

He that is a Stranger to the Avowry cannot disclaim, for a man cannot disclaim *in auter droit*. An Abbot cannot disclaim, nor Tenant in Tail. *Mich. 9 E. 4. fo. 34. Hill. 8 H. 5. Disclaimer 11. 26.*

If a man hath common by Especialty, as in Land held of me, the Rent is not arrear, if I take the Beasts of the Commoner I do him wrong, and he shall recover damages; for he may Plead *rien arreare*, although that he be a Stranger to the Avowry.

If the Tenant be in arrearages with his Lord, and the Tenant makes a Feoffment in Fee, which was notice to the Lord; in this case the Lord may choose whether he will take him for his Tenant or not, if he will not tender him his arrearages; and the reason is, if he will accept him for his Tenant generally, he shall never be received to avow for the arrearages afterwards.

But

But if the Tenant dye, so that the Tenancy descends to his Son, or that the Tenancy is recover'd, or that the Tenant hath forjudg'd the *Mesne*, so that he is become Tenant to the Lord *Paramount*, in all these Cases he shall accept them for his Tenants, and make Avowry upon them for all the arrearages; and the reason is, because they are become Tenants to him against his Will.

*As to Avowries 5 things are to be known.*

1. **A** Vowry upon my very Tenant, where the Lord hath the Rent in Fee simple, and the Tenant the Tenancy in Fee.

2. Avowry upon my very Tenant by the manner, as I make a Gift in Tail, remainder over reserving Rent.

Also if Tenant by the Courtesy, I avow upon him as before.

Also where a man dyes seised of three intire Mannors, and if his Wife be endowed of one Mannor intire.

3. Avowry upon my Tenant by the manner, as Lessee for life rendring Rent. Also if a Woman be endowed of the third part of a Mannor, the Heir distrains her and avowes.

4. Avowry upon the Land, as a Rent-Charge is granted, the Grantee avowes in the Lands charged with his distress.

5. Avowry

5. Avowry upon my matter, as I am seized in Fee, and let for years for certain Rent, and so shew the whole matter.

Avowry for Homage, or for Rent-service, although that the Avowry be made upon the person incertain, yet in this case he that is a Stranger cannot plead any thing but *hors de son Fee*, or that which is *Tantamount*, as a Release &c. which prove the Land to be out of the Fee of the Lord.

A Man cannot avow the taking of Beast for Rent arrear, if those Beasts were taken by Night, but for damage Fesant he may. *Pasch. 10 E. 3.*

Where the Avowant shall justifie, and where he shall make Avowry.

Where the Avowant is of right to have the thing for which he distrains, he shall make Avowry, although that the Estate of him upon whom he avows be determined; as if I let Lands for term *d' anter vie*, and I distrain for the Rent, *cestuy que vie* dies, the other sues Replevin, I make Avowry for homage; he that ought to do homage dyes, his Executors sue Replevin, now I ought to justifie because the thing for which the the distress was made by his death is gone and extinct.

As, two Jointenants, the one enfeoffs a Stranger of all that &c. upon Condition the Feoffee gives notice to the Lord, here he holds

holds of the Lord *pro partibus illa*, and the Lord shall have several Rents of the Tenants. And yet if the Lord grant the services of the Feoffee to a Stranger, and he attorne, and afterwards the Condition is broken by which the Feoffor who was Jointenant enters again, here the Jointure is reviv'd, and they hold the grant of Services of his part, and the other Jointenant holds of the Lord as he held before, and yet they are Jointenants.

Avowry by the Lord for homage, and alledgeth seisin by the Husband of Lands which he hath in Right of his Wife. The Plaintiff alledgeth that the Husband hath nothing but in right of his Wife, and although he alleadgeth seisin by the Husband &c. yet he sheweth that the Husband was seized in his demesne as of Fee, without that, that the Wife hath any thing &c. 11 H. 4.

If a man makes Avowry upon one as Son and Heir of his Mother, where he is in as Heir to his Father, the Avowry is abated.

In Avowry for Rent Service, or any other Rent, except that he shews the Commencement of the Rent, as a Gift in tail or a Grant of a Rent-Charge, he ought to alledg no seisin of the Rent in his Avowry, because he shews the Commencement of the Rent.

In Avowry for Homage or Escuage, if he shew not the Commencement of the Tenure,  
he



he ought to shew seisin of the Homage, or otherwise it is not good.

Avowry for Releif or aid *per file marrier*, he ought not to alledg seisin of the Releif nor of the Aid because that they are no parcel of the Tenure as Homage or Escuage be, but incident to the Seigniorie.

*Where in Avowry the Defendant shall answer to the seisin, and where he shall traverse.*

**I**N Avowry the Lord alledgeth seisin of the services, the Tenant cannot traverse the Tenure in part but he shall answer to the seisin; For in Avowry the Tenant shall not avoid encroachment of Services, but in a Writ of *Rescous* or in *Assise* he may avoid the encroachment, and not answer to the Tenure.

If the Lord encroch an other thing which was not part of the Tenure before the encroachment, it is void, and the party shall avoid it and Travers it notwithstanding seisin alledged; as where the Tenant holds by Homage and Ten shillings, the Lord encroches a Horse; this encroachment is void because it is an other thing, and other then the Tenure was before. Also where the Lord avowes for Homage and Ten shillings Rent, the Tenant may say that he holds of him by *Homage Ancestrel*, without that, that he holds  
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of him by Homage and ten shillings ; in this case he shall not answer to the seisin, because that he may traverse the entire Tenure of the same thing, *quod nota.*

*Where the Effect of the Plea shall be Traversed.*

**T**He Avowant avows, that *J. S.* was seised of an Acre of Land, and so seised grants him Twenty shillings Rent in Fee ; The Plaintiff saith that the said *J. S.* had nothing but for Term of Life of the Lease of the Plaintiff, the which *J. S.* is dead ; this is a good Plea, and the Plaintiff shall not say, *without that*, that *J. S.* was seised in Fee, and yet the Avowant alledgeth that he was seised in Fee, and the Plaintiff saith that he had nothing but for Term of Life which is in a manner contrary, and yet the plea is good, and he shall not be compell'd to say, *without that*, that he was seised in Fee, and the reason is, because that seisin in Fee was not the effect of the Avowry, but the Grant which is confessed and avoided ; and because Seisin in Fee is not the effect, the Plaintiff may answer it by an Affirmative, and shall not be compelled to travers with a *without that*.

The same Law is in Avowries, when the Avowant saith that he was seised of an Acre in Fee, and let the same to the Plaintiff for Life

Life or for years reserving Rent, and for Rent arrear he avows. The Plaintiff saith that one *I. S.* was seised in his demesne as of Fee, and let to the Avowant for the life of *I. N.* the which *I. N.* dyed, and the said *I. S.* entred, before whose Entry there was nothing arrear; this is a good Plea, and he shall not need to say, *without that*, that the Avowant was seised in Fee at the time of the Lease for if the Seisin had been the Effect of his Avowry, he ought to have *Traversed* or *Confessed* and *Avoided*, and this he hath not done, for the Avowant saith that he was seised in Fee, and the Plaintiff saith that he was seised but for Term of Life, the which is no direct *Travers*, but *Argumentative*, but the Plea is good enough because that the seisin is not the Effect of the Barr but the Lease, *quod nota.*

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*Bail.*

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## Bail.

**A** *Lattitat* is sued out against two in a Joint Action, and both taken, one puts in Bail as of *Michaelmas* and the other of *Hillary* Term; The Court was moved That the Bail of *Michaelmas* Term might be taken off and filed as of *Hillary* Term, Else it would be Error to declare in a Joint Action upon Bail for one in *Michaelmas*, and the other in *Hillary* Term, *quod concessum fuit per curiam.*

If a *Capias* be awarded and Returned *non est inventus* against the Principal, and the Bail bring him not in, If the Principle dye, although there be no *Scire facias* against the Bail, Yet the Bail is chargeable, For though the Court will excuse the Bail, Yet the Bail if they bring in the Principle before the Return of the Second *scire facias*, yet this is of grace and not of necessity.

If the Husband and Wife be Arrested for the Debt of the Wife, and the Baron find Bail for himself, yet he may be detained until he find Bail for his Wife; but he shall not be detained until she find Bail for her Husband,

Husband, or the Husband for himself.

Judgment was given against one in the *Kings-Bench*, upon which he was in Execution, and had another Judgment against him in the *Common-Pleas*, in which Court his Sureties to save their Bail brought him to the Barr by *Habeas Corpus* to render his Body; but before that he had brought a writ of Error in the *Kings-Bench* to reverse the Judgment in the *Common-Pleas*, but the Record was not removed. In this Case the Court said, When a man comes in to save his Bail, he shall not be committed if the party do not pray it, but when Error is brought before that he be in Execution, it is a *super-sedeas*, so that they cannot commit him at the Prayer of the party. And *Waller* Prothonotary said, That the Bail is to render his Body so that the Party may take it in execution, but here he cannot, in regard a writ of Error is brought, and therefore the Sureties shall be discharged. *Mitb. 14 Jacobi in Banco Communi.*

In the *Common-Pleas* the Bail is bound in a certain sum, but it is not so in the *Kings-Bench*; and when a man enters Bail in the *Kings-Bench* in a cause, they shall be charged in all Suits between the same partyes entred the same Term.

The Bail shall answer for all Actions brought the same Term against the Party for  
F whom

whom he is Bail, but if a man be bail for another, and hath Lands in Fee, and he declares, and afterwards the Bail sells his Lands, and an other commenceth a Suit against the party the same Term, he shall not be charged with the other Actions. *Cro. lib 2. fo. 449. Term: no Sci<sup>r</sup> Hillarii Anno 15 Jacobi Regis.*

One *Gabriel Mihil* was indebted to *A. B.* and put in Bail in the *Common-Pleas* to pay the same, and afterwards *A. B.* Arrested *Mihil* in *London* for the same Debt, whereupon Judge *Forster* (the other Judges being in the Chancery) awarded an Attachment against *A. B.* for this Contempt; and herewith agrees. *2 H. 7. Hill. 15 Jac. in C. B.*

*Bankrupt.*

**I**F Creditors after a Commission of Bankrupt is sued forth, although at the first they refused, yet within three or four months they come and tender their proportion towards the charges of the Commission, They shall be received to have their parts, as the other Creditors, if no distribution hath been made of the Bankrupts estate before.

The Commissioners of a Bankrupt may sell the Goods of a Bankrupt, altho the Bankrupt had sold them or disposed of them to his Creditors, if the sale or disposal thereof were after he became a Bankrupt.

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The Commissioners may sell the Copyhold Lands of a Bankrupt, for and towards the payment of his Debts by Deed indented and inrolled, declaring how he was found a Bankrupt, and expressing to the use of the Creditors, and at next Court the vendee shall be admitted and have his Copy.

*I. C.* and *R. C.* brought an Action of Debt jointly upon a joint Debt assigned to them by the Commissioners upon the Statute of Bankrupts and it was said by the whole Court, that the Commissioners had not pursued their Authority by that joint Assignment; for they ought *pro rata* to have assigned to every one; but quere if the joint Debt may be divided among the Creditors: and the Lord Chief Justice said, That a Custom may devide a Debt, and then *a fortiori* an Act of Parliament may. *Mich. 10 Jacobi in C. B.*

A Bankrupt cannot make sale of any of his Goods after he becomes Bankrupt; but Goods which he hath as Executor, or a Legacy before it be invested in him, or a Grant of a Reversion before Entry, all these shall not be charged within the Statute. But if a man sells those Goods which he hath as Executor, and afterwards retakes an Estate to himself, or converts them to his own use, this is within the Statute. *Per dom. Coke et alios justic. Pasch. 9 Jac. in Com Banco. A*

man shall not Forfeit those Goods which he hath as Executor by Outlary. *ib.*

## Barr.

*A Man may be Barred pro tempore, and yet afterwards he shall have his Action.*

**I**N Debt against an Executor he Pleads *plene administravit*, and so it is found, the Plaintiff shall be Barred; and yet if Goods comes to his hands which were the Testators, he shall have a Writ of Debt.

The same law in Debt against an Heir who pleads *Riens per discent*, which is found so, and afterwards he hath Lands by discent &c.

In *Formedon* the Tenant pleads the warranty of the Ancestor of the Demandant, *with thut*, that he hath Assets by discent; he pleads that he hath nothing, and it is found that he hath, he is Barred.

*To plead a thing by way of Barr or Estoppel which the Demandant or plaintiff is to defeat or destroy by the Usage of his Action, is no good Plea.*

**A**S in *Attaint* brought upon a Verdict *de nativo habendo*, Villenage is no Plea.

Also where Reversion and Rent pleaded for Assets, is not Assets, there the Heir is to defeat the Assets. If



If a man ſues a Prohibition, and the Defendant alledgeth Excommunication in the Plaintiff, he may ſay tis for the ſame cauſe.

If a Villein brings a Writ of Error upon Judgment had *in nativo habendo*, Villenage is no Plea.

*Where a man Pleads a Recovery in Barr, he ought to add more to it, or otherwiſe the Recovery is no Barr.*

**A**Nd that is where the Tenant Pleads a Recovery by default againſt the Demandant, he ought to add more to it, *viz. with that*, that he will averr that he was Tenant at the time of the Recovery.

The ſame Law if Tenant in *Precipe quod reddat* will Plead a Recovery in a Writ of Coſinage by default, he ought to ſhew how he was Coſin.

Alſo if the Tenant will Plead a Recovery in a Writ of Right againſt the Demandant by default, he ought to ſhew of what poſſeſſion his Writ of Right was conceived.

But otherwiſe it is, if he will Plead a Recovery in *Formedon* by Action tryed, this Recovery is a good Barr without adding any thing more to it; where note the Diversity.

*Where a man demands a Debt or any thing by Deed, he shall not be Barred but by deed, or a thing of as high a nature.*

**A**S Trespas for taking of an Apprentice, it is no Plea to say he discharged him, without speciality. *Mich. 22 H. 6.*

The same Law in Debt upon an Obligation, it is no Plea for the Defendant to say, that the Plaintiff hath received parcel at such a place depending the Writ. Judgment, *7 E. 3.*

The same Law in Debt upon Arrearages of Account, the Defendant Pleaded Arbitrement, it is no Barr, because that Debt upon Arbitrement is not of so high a nature as Debt upon Arrearages of Account, for there he cannot wage Law.

The same Law in Debt upon an Obligation, it is no Plea to say that he hath paid the Sum in demand to the Plaintiff, because that he ought (if he will avoid the Deed) to say that he hath the Plaintiffs Release or Acquittance to shew.

The Disseisor Levies a Fine with Proclamations, the Five years pass, the Disseisee is bound, afterwards the Disseisor reverseth the Fine by a Writ of Error, then the Disseisee may enter, and yet he was once Barred. *Wise Barr pro tempore.*

*Where*

*Where a man shall Plead a Barr which shall comprehend one matter in fait, and where it shall comprehend two matters.*

**I**F a man Pleads in Barr an Arbitrement, he ought to say where the Submission was, and also where the Award was made, and so to make the Plea certain.

But when he Pleads a Plea which comprehends two matters, he ought not to shew the certainty until the Plaintiff hath Traversed one of them.

*Of Barrs perpetual.*

**A** Woman is bound to me in an Obligation, and I afterwards take her to Wife, I am once Barred and allways Barred.

Tenant in Tail leaves Assets, which is Pleaded against him who is Heir; both he and all his Heirs are Barred for ever.

A man is bound to pay the Abbot of *Westminster* and his Successors every year Twenty shillings, the Abbey being dissolved, he is discharged of the Twenty shillings for ever.

Also if a man be obliged to keep my Court in *Dale*, I purchase all the Copy-holds and Free-holds of the said Mannor, he is discharged from keeping the said Court for ever.

*See Pleas and Pleadings.*

F 4

*Cinque.*

## Cinque-Ports.

**A**N *Elegit* to extend Lands within the Cinque-Ports was directed to the Constable of *Dover*; But he would not extend, so that the Plaintiff was compelled to have a *Certiorari* to remove the Record out of the Kings-Bench into the Chancery, And from thence by *Mittimus* sent to the Constable to make Execution.

## Custom's and Prescriptions.

**A**LL Customes against Cannon-Law are to be Tryed at Common-Law, and not in the Ecclesiastical Courts.

Customs are payable to the King by the Common-Law; the Reasons why they are so paid, see in *Davies Rep.* fo. 9. et 10. *Le case del Customs.*

See the difference between *Malum in se*, et *malum prohibitum*, and how the King may Pardon it, but not licence it to be done, 11 *H. 7.* fo. 12. et *Davies Rep.* fo. 73.

Where Debt or damages are recovered in

a Court-Baron, the Bailiff ought not to sell the Goods of the Defendant and deliver the money to the Plaintiff, But to impound them and keep them as pledges until the Defendant makes his agreement; but where it hath been the use of the Court to award a *Levari facias*, it is good by Custome.

Where the younger son in *Burrough-Englisb* dyes, the Middle Son (not the Eldest) shall have the Land. The same Law for Customary or Copy-hold Lands.

It was the Custom of the Kings-Bench every Term once or twice to send the Coroner of that place to the Marshal to view the Prisoners that are in the Marshals Custody by *Committitur* or matter of Record, and if any of them are wanting that he could not find them there, then to mark their names in his Coroners Book, and to inform the Court thereof. And thereupon the Court did pose the Marshal who was to inform the Justices what was become of those Prisoners, And if he found not sufficient cause of excuse, the Court would Record their escape against the Marshal; And the abusing of an Office, is the escape of Prisoners in the Marshal, an abuse of his Office, and just cause of Forfeiture.

If an Alien have a son that is also an Alien, and after the Father is made free, and then hath another Son, and after purchaseth Lands  
and

and dyes; The second Son born after the Freedom shall be Heir and not the Eldest by the Common-Law and usage of the Realm. And also if there be three Brothers, and the middlemost purchaseth Lands, and dyes without Heir of his Body, the Eldest Brother shall inherit and not the Youngest.

By the Custom of *London* a Feme Covert, that is to say, a Sole Merchant, may sue and be sued in absence of her Husband. *Bulstrode* part. 1. fo. 14. where you may read of three sorts of Customs that are void and against Law, 1. a Custom against Justice. 2. a Custom against the Benefit of the Common-Wealth, and 3. a Custom that is to the Prejudice of a third Person.

Custom and usage in the intendment of the Law, is such a usage as hath obtained the force of Law, and is binding to such particular place, as *Gavelkind* in *Kent*, and *Burrough-Englisb* in many Corporations in *England*.

*When the Custom of the Realm is the Common Law.*

**W**Hen it is the Common-Law, a Custom ought not to be alleadged or Pleased. But an Action against a Carrier, Hoyman, Common Hosteler, and for negligently keeping of Fire, the Plaintiff may

may declare upon the General Custom of the Realm, or not, at his Election. And note, That a Custom is always Local, and to be alledged in one certain place, but a Prescription is personal, and ought to be alledged in some persons certain, as in such a man, his Ancestors or Predecessors, or those whose Estate he hath. 22 H. 6. 22.

A Prescription is always to be of such a thing, and in such manner as may be intended to have a lawful and legal commencement or otherwise it is not good; but a Custom may be contrary to the Rules and Maxims of the Law, as *Borough-English, Gavelkind, Copy-hold Tenures*. So Lands devisable by Custom, So that the Custom be reasonable. Co. 6. *Gatewards case, & lib 5. Perimans Case.*

None can prescribe but who hath Fee, but all other Estates derived out of the Fee, as Lessee for years, Life, or at Will, ought to prescribe in him who hath the Fee. *Gatewards case, ubi supra.*

A Lord prescribed, that he and all those whose Estates he hath in the Mannor have hitherto used to have a Herriot after the death of any Tenant for life, or for years within the Mannor; and, good, notwithstanding the Estates of the Tenants have no continuance. 21 H. 7. 15.

Prescription ought not to be in the Negative, but if it be in the Negative with

with an Affirmative, it is good. 14 H. 6. 3.  
22 H. 6. 36. 11 E. 4. 2.

A Prescription by *Que Estate* ought not to be of things which lye in Grant, as Rents, Villein, &c. but ought to be made only in him, who prescribes and his Ancestors, or otherwise he ought to shew the Deed and Grant by which he claims. But a man may alledg a *Que Estate* of a thing which lyes in Grant, when it is but a Conveyance to another thing; as to say that he and all those whose Estates he hath in an Hundred have used alwayes to have a Leet: So a man may alledge a *Que Estate* in another of a thing which lyes in Grant, although not privy to the Conveyance, as the Plaintiff in *Replevin* may alledg a *Que Estate* in the *Seigniory* in the *Avouant*. Co. Lit. 121.

Such things as cannot be forfeited or seized, before the *Encheson* of the forfeiture be found by Record, cannot be claimed by Prescription, as *Bona et Catalla Felonum*, &c. Co. Lit. 113. & Lib. 9. *Abbot de Strata Marcella's Case*.

When one hath Common by Prescription, paying for it such a Summ of money, he may prescribe generally; and if the Money be not paid, it may be shewn of the other side, and also is a Condition subsequent; but when a Custom is for one to have Pot-water &c. paying a peny for it, *Quere* if it may be



be claim'd generally, because that the other part hath not any Remedy for the peny. Co 5. *Rep. Grayes Case.*

In *Replevin* the Avowant said, That the Plaintiff and his Ancestors and those whose Estate he hath in such Lands &c. have Common *in locus in quo &c.* being the Land of the Avowant, and that he and his Ancestors &c. have paid 10 s. *per annum* for the same, and so avowes; and good *per curiam.* 26 H. 6. 5.

When a Corporation ( which hath any thing by Prescription ) be changed and incorporated by an other name &c. how they ought to prescribe, see Co. Lib. 6. fo. 66. & 7 E. 4. 32. & Co. Lib. 8. fo. 64.

Inhabitants of a Town cannot prescribe, but they may alledg a Custom. 18 E. 4. 3.

A man prescribes that he and his Ancestors and all their Tenants at Will have Common of *Turbary*, it is not good. (See the Prescription in the Bishop of *Winchesters Case.* 2 Rep. 1. That he and his Predecessors, Bishops there have used time out of mind for himself and their Tenants to hold the Demesnes of the Mannor discharged from Tithes.) 9 H. 6. 62.

A Benefit or Profit *apprendre* cannot be claimed by Custom in the Lands of another, except in Cases of necessity; as in the Case of a Copy-holder, when he claims Common  
or

or other profit in the waists of the Mannor; or in other Lands of the Lord with the Mannor. But when he claims it in the Lands of any other within or out of the Mannor, he must prescribe in the Lord; and the thing where &c. be it aliened and severed from the Mannor, or comes again to the Lord, although the Copy-holder in such Cases may alledge the Custom. *Co. 6. Gatwards Case. Lib. 4. 31. Co. 8. 64. Swains Case.*

An Action upon the Case for stopping a Water-course *que currere consuevit*, was brought against one, and held good: But if it be against a Terretenant, or when a *Quod permittat* or an *Affise* is brought, there he must prescribe and shew his Title.

A Custom *pro bono privato* cannot be alledged in an Upland Town, which is neither City or Burrough: But Customs which are *pro bono publico*, as to have a Way to the Church, to make By-Laws for Reparations of a Church, Highways, or Bridges, or for the good ordering of a Common, may be alledged in an Upland Town or Hamlet. *Co. Lit. 110.*

A Copy-holder ought not to alledge a Custom to make a Surrender, because it is the Custom throughout *England*, so of a Lease for a year, for by the general Custom of *England* Copy-holders may make Leases for a year. *Co. 9. 751. Combes Case. Co. Entr. 576.*

But

But particular Customs of particular places may be alledged, as the Custom of *Gavelkind*, and of *Burrough-Englisch*, which Customs must be precisely pleaded, and alledged. 28 H. 8. *Dyer* 27 b. *Rast. Entr.* 143. Co. *Entr.* 602. But the Lord Coke in his Commentary upon *Littleton*, fo. 175. b. is of Opinion, that it is sufficient to say that the Land is of the Custom of *Gavelkind*, or of *Burrough-Englisch*, for that the Law takes notice of the Quality of the Customs.

*How, and in what manner a Custom may be pleaded; and when it shall be a good plea, and when not.*

SEE *James Bags Case* in the Lord Cokes Reports, lib 11. fo. 94. where in the Margin of the Pleading in Action upon the Case against the Major and Burgeses of *Plimouth*, it is said, that in the Plea of the Major and Burgeses, they ought to have first prescribed that they were a Corporation of a Major and Burgeses time out of mind, &c. Co. 11. 94.

*Note,* The Parishoners may prescribe to Choose two Church-Wardens, and may put them out of their Office if they see cause. The Parishoners may not bring an Action of Account against the Church-Wardens; But they may choose other Church-Wardens,

dens, and they may have an Action of Account against the former.

No man can prescribe to have a Pew or Seat in a Church, but in an Isle adjoyning to the Church which he hath used to repair at his own Charge.

If a man dwell in one Parish, and hold Lands in another Parish, he shall be Taxed towards the repair of that Church where the Lands lye, For he is accounted a Parishioner there in respect of the Land, and the person and not the Land is chargeable. But if a man lets Land to another, the Lessor is not chargeable in respect of the Rent he receives.

If a man comes to a Common Inn, and delivers his Horse to the Hostler, and requires him to put him out to Grass, and he doth it accordingly, and the Horse is stolen; the Inn-holder shall not answer for it.

Tythes shall be paid for the second mowing of Grass, unless there be a prescription to be discharged by payment for the Tythes of the first Mowing: But after Tithes are paid for the first Mowing, it is thereby discharged for that year; for all after pasture for Tythes shall not be paid two ways in one year for the same thing.

No prescription in Lands maketh a Right; Therefore a man must shew some other matter to prove his Right; but a prescription  
of

of Rents or Profits out of Lands makes a Right.

A Woman may prescribe, that all the Women within such a Town have been endowed of the moiety of all the Lands of their Husbands, of which they were seized as of Fee, yet she shall not be endowed of the Moiety of the Rent.

Where there is a Custom, That if the Father be hanged for Felony his Son shall Inherit, and the Land shall not escheat to the Lord, yet if the Father shall abjure the Realm for Felony, or be outlawed of Felony, the Land shall escheat, and the Son shall not inherit, and yet both are Attainders in Law.

But every Custom that is against the Common-Law shall be taken strictly.

## Debt.

**D**Ebt *super obligationem* in London, the Defendant Pleads *Delivery* as an Escroul in *Midd super Conditionem &c. et Issint non est factum*, by the *Issint &c.* the special matter is weighed and amounts to the general Issue to be tryed in *London per distre in Midd. et issint Rien luy doit*, is a waiver of the special matter, and tender of the general Issue. P. 27 H. 8. Pl. 34.

Debt against two Executors, one Pleads

G

plene

*Plene administravit*, the other Pleads *non est factum Testatoris*; and if they sever and have those several Pleas in Barr *multum altercatur*, Choke, they may, Moyle, they may not. Danby, Executors may sever, but if they shall have these several Pleas, doubted, *vide P. 37 H. 6.* one Pleads *Misnomer*, the other, that he is Administrator, doubted if Pleadable, and *ibidem* the Authorities they are cited, and *vide 21 E. 3. 10, 11, 12.* Defendants plead not, Executors cannot plead severally *in dilatories* but in Barr they may, *P. 7 E. 4. Pl. 19* Debt upon Obligation to perform Covenants, all being in the Affirmative, he Pleads Performance general, and by *Inglefield* and *Fitz* he ought to shew how he performed each Specialty. *Sed vide Co. 1 Inst. 303. a. b.*

In Debt upon an Obligation conditioned to discharge the Sheriff, Plea, That he discharged the Sheriff without shewing how *M. 5 E. 4. Pl. 21.*

Debt *super Obligationem* conditioned to pay to the Chamberlain of London, and his Successors, he Pleads Payment to *A. Chamberlain* and his Successors; he must Plead how he came out of his Office, and how the Successor came in, Else *A.* shall be intended to continue in *M. 4. E. 4. Pl. 30.*

Debt against three Executors who Plead several Pleas, and each goes to the whole;

*per*

*per Danby, Moy's and Clark*, the Plaintiff may elect which he will have Tried first. *Needham contra*, the most peremptory shall be Tried first. *Hill. 8 E. 4. Pl. 3.*

Debt against Executors, they Plead a Judgment against the Testator by *A.* for 200*l.* and another by *B.* for 100*l.* And that they have not *Assets*, but to satisfy the 200*l.* *per Bryan* the Plea is double, having Pleaded 2 Judgments, and rely upon one. *9 E. 4. 12. a.*

Bond to pay 20*l.* when *A.* comes into England from Venice, Plea, That *A.* was not at Venice, not good; for where part is to be done within, part without, the Tryal must be within. *Tr. 19. El. et B. Halet Case. Ow. 6.*

One bound to save another harmless, Pleads that he had saved him harmless, and shewed not how, 'tis not good; but *non fuit damnificus*, generally, is good; *et Pop. 297. dictum per Jones*, If the first be generally demurred on the advantage of it is lost, for which I think it not Law; for in *Mansels Case*, Co 2. the Demurrer is general upon such a Plea, and Judged ill. *et 2 Cro. 165. 363.*

One Action against several Defendants for one Debt &c. they may sever in Barrs, but not in Dilatories. *Hutton 26 Hob. 245.*

In Debt upon a Lease for years, the Defendant pleads *non habuit nec occupavit*, ad-

judged no Plea other then Tenant at Will, by *Fitz. Herbert. Dy. 14.*

In Debt upon an Obligation with Condition payment is a good Plea with Acquittance, as appears, *Dyer 15 b. 1 Cro. 55. 2 Cro. 59. 360. 558.* but payment on a single Bill Obligatory is no plea without Acquittance, nor it seems upon an Indenture to pay so much for a forfeiture, *Dy. 6. a. 51 a. Co 5. rep. 43. 2 Cro. 86. 377. 3 Cro. 157. 3 Cro. 455.*

Debt upon a Statute of Usury, and misrecites the Statute of Usury, and sayes in the Action, the Defendant lent money usuriouly, and received the principle, and so much for Usury, and that is Traversed and found against the Defendant, and moved to be a *Jeofail*; but it seems both Surplus, and he need not shew the Cause of Action in the Writ; And shewing the Receipt was more then received, for the very lending usuriouly is against the Statute though he never received it.

Where one has special matter and pleads it, and concludes with the general Issue; It waves not the matter precedent, as in Debt to plead *unlettered*, *issint non est factum*, or a special Payment *issint Riens luy doit*, or for one to Plead that he was Joyntenant with his Feoffee at the time of the Feoffment *et issint Riens passe per le fait*, 10 E. 4. 3. b. *M. 2 E. 4. Pl. 15. et son 9 b.* Debt



Debt on a Bond against an Abbot, he pleads, Predecessors imprisoned the *Prior*, and threatned the Monks to imprison them if they would not seal it double, one, the Imprisonment of the *Prior*; the other the threatning of the Monks: And if both should be traversed and one found for the other against the Plaintiff, the Court should not know for whom to give Judgment. *M. 15. E 4. Pl. 2.*

In Debt of 100 *l.* the Administrator pleads Judgment of 200 *l.* to another *Soplene administravit*, and that he had not goods *preterquam non attingen' ad 200 l.* the Plaintiff demurrs generally, because he shewed no certain summ whereto the goods amounted, according to *Co 9. Merriell Tresbams Case*, 109 *b.* *Hob* and *Winch* held performance the substance. *Hob 133 Moore vers Andrews.*

The King brought an Action of Debt, and averdict upon *non est factum* pleaded, and after pardoned the Debt; which Debt he at the day in Bank pleaded, and was allowed to do it because he could have no *Audita Querela* or *sai. facias* against the King *Co. 3. f. 135.*

Debt, and shews, that he made a Lease for years Rend. &c. the Lessee was thereby possessed, and devised it to the Defendant, and he entred, and *Null possession &c.* ill, first, because he shewed not that any was

made Executor, or that he entred by his Assent; nor 2 that *virtute legationis* he entred, and then it might be for another Title. Dy 254. b 3. Cro 537.

Debt of an Obligation conditioned, that he and his Wife should appear; he pleads that at the time of the Obligation he was *solus* and *innuptus*, Rolls held it did not amount to *ne unquam*: *Loyalm<sup>nt</sup> accou<sup>p</sup>e* and ruled for Judgment upon Demurrer *nisi Causa* *Yeane vers Skelton H 23 Car. 1. B. R. Sti. 17.*

Debt to perform an Award made 10 May, ready to be delivered the 11th of May, Nul Award pleaded; he replies, that the Award was made the 10th of May, to be delivered the same 10th day of May; The Defendant demurred for doubtfulness or departure; Resolved not: yet being a thing whereof Issue is to be of the Award, not of the day of the Award *Tyers Case. Trin 23. Car. 1. B. R. Sti. 4.*

Debt upon an Obligation, he pleads, that he pay'd at such a day, the Jury find he did not pay at that day, the Truth was, there were two dayes of payment, and he payd one part the one day, and the other at the other day; the Court seemed he is condemned by the Verdict and his own Plea, *P 24. Car 1. B. R. Sti. 93, 94.*

Debt upon Obligation to perform Articles, the Defendant pleads Covenants performed; Issue and Verdict for the Plaintiff, who

who moved for a new Tryal to prevent Error, because no Issue joyned; but the Court said it was a good issue, but ill plea whereon he might have demurred, and ruled: the Defendant shews Cause why a Replication should not be. *Weights Case M 24. Car 1. B. R. Sti. 139, 140.*

In Debt upon a single Bill, the Defendant pleads he had paid, and the other accepted part since the Action brought, ruled a good Plea in Abatement of the Writ, not in Barr of the Action as here 'tis *Hillingworth versus Whetstone. P. 1649. B. R. Sti. 112 163 Co. 9 Inst. 303. 2 Cro. 304. 959. H. 10. H. 7. Pl 3. M. 21. E. 4. Pl. 38.*

Debt for 40. l. against an Executor, he pleads, that he received but 10 l. and 40 l. was due to him, the Plaintiff replies, that he is Executor *de tort*, and has more goods *Et hoc paras' &c.* where it should be *Et hoc petit*, &c. ill, and that discontinues the whole Plea. *Alexander versus Lane.*

In Debt for Rent, Lessee pleads, that Lessee for *nil habet* &c. he replies *quod habet*; 'tis ill, not shewing what estate, but cured by Verdict, if Issue be joyned and found *quod habet*, *Hill versus Glassey. Tel. 227. 2 Cro. 112.*

Debt upon two Bonds, whereof one is not due, the Defendant pleads a Release of that, and another Plea to the other, both found against him, and this shewed in Ar-

Test of Judgment, yet shall not be stayed ; for by his pretending a false Release , he passed over that Advantage. So in Debt by an Executor, the Defendant pleads he has a Co-Executor who has released to him, and found against him, the Plaintiff has Judgment *Friths Case*. 3 Cro. 68, 69. 4041. 110. 111.

In Debt on an Obligation the Defendant pleads *a jour*, and issue of it *puis darr. contin.* he pleads that the money was attached in his hands in *London. Pel versus Pel* 2. Cro. 101.

Debt upon two Bonds, the Defendant demands *Oyer* of the Condition, one of which was to pay &c. after performance of a Will, the other was to pay &c. within two years after the Devisor's death and performance &c. and pleads, that the Will was that he should make a Release, and alledges the death to be at such a day which is within two years, and that he required the Defendant to make a Release, and he refused, Issue of the death and all found for the Plaintiff, moved in Arrest &c. one day is not come and damages intire, so no Judgment to be, but *per Cur.* 'tis only the Allegation of the Defendant, that he dyed at such a day, which if true, the Defendant would have rested on it and not have pleaded a false Plea whereon the Issue is taken, and found against him. *Thurbett'e versus Reeve* and

and *Tye*, 3 Cro. 110. III. 40. 41. 68, 69.

Debt upon an Obligation, the Defendant pleads *non est factum*, 'tis found that he Sealed, &c. and the Seal was torn off, after the Plea pleaded, but on at the time of the Plea, 'tis against the Plaintiff. *Mirral versus Seebright*. 3 Cro. 120 Co. 5 Rep, 119. b.

Debt for Rent against an Executor, he pleads *Levy per distress* and *sans Detinet*, void, find no Levy by distress, but that an assignment was made by the Testator, and the Rent paid by the Assignee, and adjudged for the Defendant, for the substance is on the new *Detinet*, and the rest but circumstance. *S. Tho. Cecil versus Harriot* 3 Cro. 140.

Debt on a Bond, conditioned to save harmless against another Bond of Fifty two pounds, And so he saved him harmless; but because that he shews not that he was not damnified before. *ill*; *Denis versus Thomas* 3 Cro. 156.

In Debt on a Bond by *A.* and *B.* the Defendant pleads the Obligation was made to them and *B.* And that all three have an Action depending against him, Judgment is got, but because the Bond to three cannot be intended, And that the Plea goes in Abatement and he has concluded in Barr, *ill*; *Ismaet Priscot versus Hitchcot* 3 Cro. 102.

Debt on Obligation, conditioned, If such Lands be four miles distant &c. the Defendant,

dant pleads that 'tis four thousand paces distant, the plea Ruled good, for a thousand paces is a mile, So it tantamounts the Condition; but how a mile or the spaces shall be reckoned *per communem viam* or strait as a Bird could Fly *qu. Mirige versus Est. 3 Cro. 212. 267.*

Debt *super Obligation*, conditioned to pay 35 l. at *Michaelmas* and 33 at *Lady-day*, he pleads payment of the 70 l. *secundum formam Conditionis*, good, though objected, he should have pleaded several payments, for the several Conditions do impley it. *Lox versus Lee 3. Cro 256.*

In Debt a good plea in Barr, replication ill, Judgment by *nil dicit*, because the Defendant never rejoined shall not be reversed, for that ill till all be made up; herewith agrees *Co 5. Rep. 55. a. Princ. & Boyer versus Jennings, 3 Cro. 284.*

Debt against an Executor, the Defendant pleads, that pending the Action, another brought an Action for a true Debt of the Testator, which he confessed; and that he has nothing wherewith to satisfie the Judgment; the Plaintiff *protestando*, that was a true Debt *pro placito*, replies, that the Recovery was by *Covin* to deceive him; Defendant demurs; and adjudged against him for the *Covin* is not Issuable, but reversed in Error, nor could the Recovery be by *Covin*,  
if

if the Debt true. *Greene versus Wilcox* 3. Cro 462 463.

Obligation, conditioned to appear in the Kings-Bench, the Defendant pleads, that the Court was adjourned to *Hartford*, and that he appeared there; ill, not saying *prout patet per Recordum*. *Corbet versus Cooke* 3 Cro 466.

Debt *super* Obligation covenanted to appear in the Kings-Bench such a day, and there elect two Arbitrators who with two more to be elected by the Plaintiff shall Award &c. the Defendant pleads, that he appeared there at the day, and there elected two; the Plaintiff was not there time enough for the Award to be made nor that he had his Arbitrators there. *Edwards versus Marks*. 3 Cro 549.

Debt upon Obligation conditioned, that if he upon request deliver the Plaintiff all the Tallow that shall be made before *Michaelmas* of all Beasts killed by him or his servants, then &c. the Defendant pleads generally *prout* in Condition, the plaintiff demurred, supposing he ought to set out particularly that so many Beasts were killed, which were all &c. As *Maleveres* Case cited, Bond to pay all Rents of a Mannor, they must set forth that such Rents be paid, which were all; but resolved good; for where the length of

of particulars would cumber Records, 'tis allowed to plead generally to all affirmatives as performance of all Covenants &c. and the Case cited doubted of, unless it being certain, may be set down in short. *Mints versus Bethell* 3 Cro 749.

Debt upon Obligation the Defendant pleads *quod factum predict'* was sealed without date, and the Plaintiff put in a date after *Et sic non est factum*, and on demurrer adjudged against him, for by saying *factum pradiatum* he has confest his Bond, but he should have pleaded *non est factum*. *Cospee versus Turner* 3 Cro. 800.

Debt *super* Obligation, conditionee to redeem Lands mortgaged; the Defendant Pleads, that they were not mortgaged; the Plaintiff replies, that they were mortgaged, and sayes not how, by Feoffment, Bargain and Sale &c. yet well, being a stranger to it. *Baley versus Tayler* 3 Cro. 899.

Debt upon Obligation made to perform a Will which was to pay 20<sup>l</sup>. to the Poor, and the Church-Wardens of such a Parish, he Pleads payment to the Church-Wardens and Poor; without naming of them; yet good. *Fring versus Laws*, 1 Leon. 17.

Debt on an Obligation to perform an Award to deliver up all the Houses that he had, he pleads that he delivered up all &c. without shewing what they were, and adjudged ill;



ill; and where it was awarded he should discharge and save harmless *N.* from such an Obligation, he pleads *non damnif.*; ill, for he was not only to save him harmless, but to discharge him of the Bond, and that ought to be shewed now. *Bres versus Andrew.*

1 Leon. 71 M.2. R 3. b. 17.

Debt in Wast of a Lease for years generally, the Defendant pleaded, that the Lessor *nil habet*; the Plaintiff replies, that the Lease was by Indenture; a good *Estoppel* no Departure, for it corroborates the Declaration. 1 Leon. 257.

Debt super Obligation, Condition, That *J. S.* shall not disturb the Plaintiff in his possession by any indirect means, but by due course in Law, objected the plea ill, because not shewed how by due Course, *viz.* what suit, 'tis agreed the plea had been good if he had said only not disturbed by any indirect means; but doubted if not ill, because he pleads over by any Lawful means, and shews not what, so it might be tryed. *Dighton and Clark's Case* 2 Leon. 199.

Debt upon Obligation conditioned (*inseralia*) to account, the Defendant pleads conditions performed, the Plaintiff replies, he had not accompted; ill, not shewing what he had to accompt for, and difference taken when the Condition is in the negative, not to do a thing, 'tis sufficient to say he did

did not do it. And when in the Affirmative to do, as to perform his office, and to Enfeoffe him of all his Land &c. there he might shew what his office was, and what Lands he had; And that he did &c. *M. 2. R 3. fo 17. Pl. 44 vide Latch 16. 1 Leon. 136. Tr. 4 H. 7. Pl. 6.*

In Debt on an Obligation the Defendant pleads payment, and the Obligee delivers up the Obligation in nature of Acquittance, and after Retains it by force, the Plea not double, as objected, the payment not being now issuable but only the delivery of an Acquittance, also the delivery is pursuant enough, and though difference taken in Debt on a contract to plead Payment and Acquittance as double, yet in Debt on a Bond not. *H 1. H 7. fo 15, 16.*

Debt upon Obligation conditioned to gather all the Amerciaments of the County &c. the Defendant pleads that he collected all &c. without shewing what they were; yet good as well to prevent infiniteness, as for that they are not in fact and in the Affirmative, otherwise if matter of Record, as to be nonsuit in all &c. there he must shew the several suits. *per Bryan. H 2. H 7. Pl. 22 p 13. H 7. Pl 1. m 21. E 4. Pl 37.*

Debt to perform an Obligation conditioned to perform an Award, *Ita quod* &c. The Defendant pleads, that the Arbitrators made  
no

no Award nor demanded it; 'tis a double Plea; one, that they made not &c. and the other, that they did not &c. *m 5. H 7. Pl 15.*

Debt upon Obligation to make Assurance as Counsel should advise, pleads, that Counsel advised, and he gave notice &c. not double, though the advice and notice be two things; traverse, for without notice, no sufficient breach *Tr. 6. H 7. Pl 5.*

I am bound to perform all Covenants of an Indenture, if they be all Affirmative and matter in fact, I may alledge performance generally, without shewing how or what they be, otherwise of matter of Record: but if the Covenants be in the negative, I must plead negatively to them, particularly if the Covenant be disjunctive, I must shew which part I have performed and if the Covenants be in the Affirmative, and the Obligee to do an Act towards the performance, I must answer it particularly, as Covenant in sale of Woods, to leave six Trees standing at the appointment of the Bargainer, & must shew what he did or did not appoint: So if the Covenant be an Affirmative that implies a negative, as to save harmless, I may plead the negative *non dampnificatus*; *P. 10 H 7. Pl 3. P. 16. H 7. 11. 1. Ca 3<sup>rd</sup> ff. 303 b. a. b. 13 H. 7 pl. 1. M. 21. E 4. pl. 18.*

Debt, the Defendant pleads the Statute of

of Usury, and that the Plaintiff lent him &c. 12 July, and shews no usurious contract; the Plaintiff replies, and shews the lending to be for a longer time and so not usury *Abque hoc quod corrupta* &c. the Defendant rejoyns, that it was but for the shorter time *abque hoc*, that upon the 12th of July was agreed for a longer time; the traverse tying him up to the 12th of July and so make the day material, ill, *Newson versus Whitty* 1 Cro. 260.

In Debt against an Executor he pleads *quod non habet nec habuit die impetrationis bille bonis que fuerunt Testator tempore mortis sue preterquam* &c. Exceptions that *tempore mortis* is ill, for he may have Goods that were not his *tempore mortis*, and damages recovered, Lands devised to be sold, and sold, and yet are disallowed for not intended still shewed. Secondly, because he sayes *nec habet tempore bille*, but sayes *non habet tempore*, 'tis incurably ill; for if he had the day of the Plea pleaded 'tis Affets. *Green versus Hill* 1 Cro. 131, 132.

Debt on a Statute Merchant, the Defendant pleads that the Clerk mentioned, was no Clerk at the time, but did not insist on it, and seems not Pleadable, for a Statute is a Record, and 'tis against a Record. *Ans versus Tucks* 2 Cro. 136.

In Debt against an Executor he pleads

a Judgment in Barr, and because he did not plead *prout patet per Recordum*, it was resolved to be ill. 2 Cro. 226.

Defendant in Debt to perform an Award which was to enfeof or Release; or pay 20s. pleads performance; ill, not shewing which; for performance of any one is good excuse; wherefore he must shew what he hath performed. 27 H. 6. 1. b.

In Debt against an Executor or Administrator he pleads a Judgment, and that he hath not Goods *preterquam que non* &c. Co. 9. Rep. 109, 110. 'Tis held ill on general demurrer, not shewing what sum he has; but *Hob. 133. More versus Andrews*, 'tis held but form, and good on general demurrer, and *Vide Co. Entr. 446. a. 148. Pl: 27. 152. a. 269. a. 617. b.* It is oftner pleaded in the general, then to plead a particular sum &c. here the Court held it but a form, and cured by General demurrer, *Davies versus Davies. Tr. 16. Car. 2. B. R.*

Debt on a Bond conditioned to pay all &c. Defendant pleads he paid all without shewing what; the Plaintiff replied he received some sums and has not paid, the replication good, for the knowledg is on the Defendants side what he received, therefore to have been set out by him and not by the Plaintiff in the Replication, and therefore

the Barr ill. *Woodcock versus Cole. Tr. 16. Car. 2. B. R.*

Debt *super* Obligation conditioned to deliver such Letters by such a day ; plea, that he delivered them *secundum Conditionem* ; ill, for being to do a particular thing by a particular day, he ought to have pleaded particularly, and not generally *secundum conditionem Brook versus Deane. P. 16 Car. 2. B. R. Rot. 451.*

Debt upon a Bond at *London* conditioned, that if a ship do not miscarry &c. Defendant pleads she miscarried in *Cornwall*, ill, for he cannot plead transitory matter in another County then the Action is laid, and so altered the Trial, and if he have local matter to plead, he must shew it *Collings versus Sutton. Tr. 16 Car. 2 B. R. rot. 1666. 11 H. 4. 50. a. b.*

Debt, and counts that one possessed of a Term, granted him a Rent, by mean Conveyances is come to the Defendants, and shews not how ; yet ruled good *aliter*: if the Term be pleaded to come to himself or any that he is privy to. *Note*, This was after Verdict, but no advantage taken of the Verdict. *Cotes versus Wade. m. 18. Card. B. R.*

Debt for an Escape, and begins with the Writ of Execution and Arrest ; ill, not shewing the Judgment *quod cum recuperasset &c.* *Jones versus Pope M. 18. Car. 2 B. R.*

Debt

Debt on a Bond conditioned to save against another Bond, Defendant pleads that he did save, not shewing how; the Plaintiff sayes he was sued at Law *pro eo quod*, the money was not paid, and pleads not the Writ &c. as he ought, the Defendant rejoynes, he had not notice, which is a departure and not material, the Plaintiff demurrs. Resolved, the Barr ill, but if not to have it specially assigned for cause. *Secondly*, the *eo quod affirmative*, and Traversable as well as if said in *facto*. *Thirdly*, the Replication ill, not pleading the Writ &c. *Fourthly*, because the rejoyners is a departure and admits it being but ill, for incertainty and circumstance has cured it. *Cather versus Peirce Southres and Falker M 18. Card. 2. in Sci.*

Debt against an Executor who pleases three Judgments in debt had against him; and sayes *non pro vero debo*, and concludes *procurator per se per alia recorda et inde executione* taken to it; for both Cases no resolution. *Palmer verses Lawson M. 18. Car. 2. R. R. Rot. 302.*

Debt on a Bond to perform an Award, *Ita quod*, it be made before 25 *March* pleads *null* Award; replication, that *ante 27 May* they made an Award, good; without saying *infra tempus limitat.* they may traverse *nullum* &c. without traversing the day, if not

before the day, the Jury is to find it  
*Skinner versus Andrews, Hill 20.*  
*Car. 2. B. R. Rot. 292.*

Debt against two Executors, they plead  
 a Judgment had against one as Administra-  
 tor, who *ultra* to satisfie hath not Assets *et*  
*bene. Parker versus Amy. Hill. 20, 21. Car.*  
*2. B. R.*

Debt on a Bond against an Executor who  
 pleads a Judgment and a Bond, the Plaintiff  
 replies the Judgment satisfied, and satisfac-  
 tion given *Et hoc paratus est verificare*, And  
 to the Bond assets *ultra*, *Et hoc petit quod in-*  
*quiratur per Patriam.* Defendant demurrs;  
 and adjudged for the Plaintiff, though not  
 said to the first *per Recordum* for but form,  
 and cured by the general demurrer; also he  
 has not answered the last issuable Plea. *Han-*  
*cock versus Proud M. 21. Card. 2. B. R.*

Debt on a Bond conditioned to do several  
 things; Defendant pleads performed gene-  
 rally and demurr, adjudged ill, he should  
 have answered to all the particulars expres-  
 sed in the Action; *aliter* where 'tis to perform  
 Covenants, *Winbleton versus Helderup. Trin.*  
*22 Car. B. R. rot. 704.*

Debt on a Bond conditioned to perform  
 Covenants which were within two years to  
 deliver a Mapp of all Land in *D.* in the pos-  
 session of *A.* Lessee of *B.* and *B.* pleads  
 performance, repl. Assigns breach, that Les-

see



see did not deliver a Mapp withintwo years of all the Lands in *D.* in his Occupation, and in the occupation of *B.* and *C.* and the replication seems ill, first because he does not say Lessee nor his Executors: Secondly, in his occupation, is uncertain what is meant by it. Thirdly, he ought to shew what Lands were in the possession of *B.* and *C.* *Q.* If the recital not an Estoppel to say none were. *Palmer versus Greenhil*, Executor of *Greenhil Pa.* 11 *Jac. Rot* 688 *Bridg.* 46.

Debt by two Barons and their Femmes on an Obligation made to their Femmes when sole, and say, the money was not paid them, good, and though not said *vel licui eorum*; for payment to one, is payment to both. *Sparmer versus Stone et ux* vide *Pa.* 77 et *Latch* 49 and *Pop.* 161 *ibm.* 3. Count jointly and severally in Action against one, sufficient to say he paid not; but if against all, that they *nec aliquis eorum* *Noy.* 69.

Executors sue on a Bond Testat. plea, *non est factum*, after Verdict for the Plaintiff, moved, yet he had Judgment. *Noy.* 79.

*A.* and *B.* jointly and severally bound to stand to an Award betwixt them and *J. S.* Arbitrators, awarded *A.* to pay *B.* 3 s. *B.* to pay 10 s. to *J. S.* in debt on the Bond in Plea for *A.* to say he had performed

the Award, without shewing how, and how, *B.* had performed it, for he is bound to him also. *Bendl. 5.*

Debt on a Contract, Defendant pleads payment in a Forraign County; and on demurrer adjudged ill, he might have pleaded in the County: and so was the Opinion of *Twisden* in the King's-Bench *H. 22, 23. Car. 2.* That if a Forraign plea which is not local be pleaded, the Plaintiff may demurr upon it, but if it be local, he cannot demurr upon it, but then the plea must be sworn.

Debt on a Bond to account, he pleads he accounted; Plaintiff Assigns breach in 30 *l.* received not accounted for. Defendant rejoynes and saies Robbed of it, and gave notice *Et hoc paratus &c.* good, and not *Et hoc peius &c.* for now he leaves the other to traverse the Robbery, though it makes a negative and affirmative. *Vere versus Smith P. 23. Car. 2 B. R. Cook versus Whorewood.*

Debt on a Bond to perform Covenants to enjoy such Land against *A.* and *B.* Defendant pleads Covenants performed, Plaintiff replies and sayes, *A.* and *B. habentes jus virtute tituli eis inde facti ante Burg. predicta* entred; the Defendant demurrs because the breach Assigned too general; but *per Hall* good enough, he being a Stranger. *Twisden* doubted. *Proffor versus Newton Trin. 23. Car. 2. B. R. Rot. 826,*

Debt

Debt on a Bond to seve harmless from payment of Legacies, and Assigns breach, that *A.* sued in Chacery for a Legacy, first, not shewing were the Chancery was. *Secondly*, saying, he sued for a Legacy, and saies not *in fact*, a Legacy was given. *Dainty versus Faire Mich.* 10. *Jac. B. R.*

Debt upon an Obligation dated at *Hamburgh* was brought in *London*, and good; for *Hamburgh* in that sence shall be taken for a place, as *Antwerp* Tavern in *London*, not for the Town of *Hamburgh* in *Germany*, and it was brought in the *Detinet* only; and yet good, because of Forraign Cöyne, But naught, if for *English* money.

A man may bring an Aëtion of Debt upon a Statute-Merchant, but not on a Statute-Staple.

Debt against a Prisoner for Debt, or for an Attorney for Fees, no Wager of Law lyes: But a Prisoner for Lodging and Dyet may wage his Law. It lyes not for Rent, it lyes upon a simple contract if it be brought in Debt, But if it brought in Case, the Defendant cannot wage his Law.

A man brings an Aëtion of Debt against two, and hath Judgment, and two *Precipe's* against them, and Arrests one by *Fieri facias*, and the other by *Capias ad satisfaciendum* it is vicious, *per totam Curiam*; But he may Arrest one by one *Capias*, and the other by another

*Capias*; and if one of them satisfies the Judgment, the others Body is free: and with this agrees 36 H. 6. *Hillary's Case*, and 4 E. 4. it is said that the Plaintiff shall have but *unicam executionem*, i. e. *unicam satisfactionem*. Mich. 11 Jacobi in *Communi Banco*.

An Action of Debt ought to be brought in the *Debet et Detinet* against an Heir, but against Executors only in the *Detinet*. per Coke, Lord Chief Justice. *ib.*

A man brings a Writ of Debt upon a Deed, and declares *de octinginta Libra*; the Defendant prays *oyer* of the Deed, and hath it, and it was *octogesima Libra*, and good *per totam Curiam*: and with this agrees 9 H. 6.

et Pasch 12 Jacobi, where *vginta* for *viginti* was adjudged good. Mich. 13 Jacobi in C. B.

### Detinue.

IN *Detinue* of a Box of Writings the Defendant pleads that *A. B.* and *C.* have each of them severally brought their Writ of *Detinue* against him; and brought the Writings into Court ready to deliver to whom the Court shall award; they shall interplead, and the interpleader shall be on the eldest Original (*viz.*) *A.* shall interplead with the Plaintiff to Barr his Title, and *B.* shall plead against them all; But  
*vide*

*vide* if there be variance of the Writings, &c. in the Declaration when no interpleader shall be. *P. 4. E. 4. Pl. 11. 11. E 4. 11. a. 3 H. 6. 20. a. 32 H. 6. 25. b. 25 H. 6. 20. a. Trin. E. 4. Pl. 2.*

*Detinue*, and counts of a purchase of an Annuity and the deed; the Defendant pleads *non Detinet*; Jury find the sale &c. but it is not agreed that the Defendant should detain the Deed till the money paid, which is not before the plea; but on the general Issue he ought not to have given, that in Evidence, but should have pleaded it; for upon the general Issue that which would make a special Barr cannot be given in Evidence, or if found by the Jury is it material. *vide Cest Case title Averment, 22 H. 6. 37.*

*Detinue* of Charters and Counts of a writing *Cont* that *I. S.* infeoffed &c. And though he said but *in facto* a Deed whereby *I. S.* infeoffed, &c. but *Cont* that &c. And so for ought appears no Livery might be; yet *per curiam*, well; for 'tis a deed though nothing passed, and the Action lyed. But *Princ.* it may work by Confirmation. *39 H. 6. 37. b.*

In *Detinue*, after Verdict, 'twas moved in Arrest of Judgment, that *Sattago* was not good, but *Sartago*, and *igneum ferrum* *anglice* a firegrate, improper: yet the Court adjudged

adjudged the Declaration good enough.  
*Smith versus Warder* 13 Car. 2. in B. R.

*Of Disclaimers and Discontinuances of Actions.*

**O**Ne brought an Action of Covenant, and had Judgment and a Writ of Enquiry of damages, and afterwards it was discontinued by Rule of Court. *Trin.* 10 Jac. in *communi Banco*.

If a man brings an Action of Trespass in 3 Towns, and mentions, but 2 Towns where the Trespass was committed, the whole is discontinued. 16 E. 4. 11. So 9 E. 4. 51. A man brought an Action of Debt and demanded by his Writ 10 l. 6s. 8d. and his Declaration was but of 10 l. and his Writ did abate.

An Action of Trespass was brought in the Court of Common-Pleas of several things, one of which was discontinued, and by *Warberton* Justice, the whole Action was thereby discontinued, adjudged in Sir *Fran. Pawmes* Case.

If two are bound jointly and severally, and an Action of Debt is brought against them both, and it was discontinued against one of them, it shall abate against both. 7 H. 4. *Fitzh. Tit. Breif.* 279. 5 E. 4. 107. But by *Hobart* Chief Justice, a man may put more in the Writ than in the Declaration,

tion, but not more in the Declaration than in the Writ. *Hill. 12. Ja. Pl. 4* in C. B.

In *Audita quarela scire facias* or Attaint by 2, the Nonsuit of one shall not be Nonsuit of both, and his Release shall only Barr himself; and the reason is, because they are compell'd by the Law to joyn in the Action, and the cause of Action accrues not by their deed but by Act in Law, and for that the Law is favourable to them; So that if one will not sue, the other may sue by himself. But if a debt be due to two by reason of Contract or by Obligation, or two Jointenants have cause to have an Action of Trespass, in this case the Nonsuit of the one, or the Release of one shall Barr the other, because it was their fault to take such a joint Estate, or that the Obligor was bound to them jointly. 35 H. 6. 23. a.

In *Replevin* Verdict is given for the Avowant, and the plea is discontinued afterwards by the death of the King, or otherwise, and the Avowant sues a *Scire facias* against the Plaintiff; in this case the plaintiff may plead a Release of the Avowant after Verdict of all Actions, or he may plead other matter to discharge himself. 5 E. 4. 19.

In Trespass the Defendant pleads two pleas, and the Plaintiff demurs to one and doth not plead over to the other, it is a discontinuance,

continuance, as it appears by two Presidents in the Books of *Entries*, and *Holcroft's Case*, Co, Lib. 4. where it is pleaded accordingly.

In *Precipe quod reddat* the Tenant disclaims the Judgment shall be, that the Demandant *nihil capiat per breve*, and if the Tenant will make a Feoffment in Fee, the Demandant may enter upon him, and if the Tenant will discontinue, the Demandant may say that he hath nothing in the Land but by disseisin which he made to *J. S.* and put him from the disclaimer, because that by the disclaimer he hath nothing but his Right; and the Entry of the disseisee is lawful upon him, because that he hath nothing until by that discontinuance he perfects the Recovery.

In *Replevin* the Defendant makes *Conusans* as Bailiff to an Abbot upon an Estranger as upon his very Tenant. The Plaintiff prays aid of this Stranger because he let for years; they join in aid and process is continued until his Term, at which time the Term ends, they both disclaim to hold of the Abbot; the Court awarded that the Plaintiff sue forth a Writ of Inquiry of Damages. 29 H. 6.

No man can disclaim against a Termor, because that if his Lessor will not bring his Writ of Right upon disclaimer, he hath no Remedy. 9 E. 4.

Husband and Wife cannot disclaim in *Avowry*



vowry, for if they do, the Lands of the Wife shall be lost by it. 10 E. 4. per Cur'.

In *Replevin* the Defendant avows upon Plaintiff, and he disclaims to it, he shall not be received, *for you have made a Feoffment of the Lands, so that we cannot have a Writ of Right, Sur disclaimer*; held a good plea; To which the Plaintiff saith, that he was seised of those Lands in Fee, *without that*, that he hath made a demise.

In a Writ of Entry *in le quibus* of the disseisin of the Demandant or his Ancestor against two, one would disclaim, and could not because he was in of his own wrong.

## Distress vide Trespass.

**I**F a man distrain Household-Goods, That will take hurt by wet or weather he ought to impound them in an House within three miles within the same County where they were taken; But if he put them in an open place were they perish, the distreynor shall not answer for them.

If a man distreyn a Horse, and the Horse leaps out of the Pound, and after the distreynor Retakes him and ryes him to a Post, and in strugling the Horse strangles himself, the Distreynor shall be punished in an Action of Trespass.

So if a man distrain a Cow, he ought not

to milk her although it be for the good of the Cow; for you must not do good in such a Case without the Owners consent: For Peradventure the Owner might come in time and milk her himself; and if the Cow perish for want of milking, The Distrayner may distrayn again and so be at no damage.

An Officer of the Sheriff cannot justifie the breaking open of doors to distrayn for the Kings Rent, much less a Landlord.

A man shall not use things distreyned, because he hath them but as Pledges in the Law.

No man shall drive a distress out of the Hundred it was taken in or to any Pound above the space of three miles, or into several Pounds, whereby the party shall be driven to take out several *Replevins*.

None shall drive a distress out of the County, Nor shall distrain in the High-way; None shall drive distress into a Castle or Hold to withhold them from the Owner upon his *Replevin*.

If a man come to distrain and the party seeing his purpose drives the Cattle off the Land or put the goods out of the house, to the intent he shall not take them upon the ground for a distress; Then I may lawfully pursue, and if I take the same upon the Highway or upon the ground, the taking is lawful as if I had taken it upon the ground or house out of which the rent issues to  
whom

whomsoever the; property of the goods or Cattel do belong.

A man cannot distrain for an amerciament in a Court-Baron, but for an amerciament in a Court-Leet he may.

If a man grants a Lease to *B.* rendring Rent to be paid at four several Quarters, and if it be behind and lawfully demanded, That then it shall be lawful for the Lessor to distrain &c. If a man comes to distrain, and the Tenant inclose the ground or shuts the doors of the house, That the Landlord cannot distrain for his Rent, it's a disseisin; For the Landlord may not break the doors or Fences to come at the Distress.

Also Forfallment, That is lying in wait or threatning a Landlord, whereby he is disturbed, and hindred of the means to come by his Rent, is a disseisin of the Rent, *viz.* to hinder the taking of his Rent.

A man brought Yarn to the house of his Neighbour on Horse-back, to the intent to weigh the same by his Neighbours Beam, the Landlord comes and distrains the Horse and Yarn for Rent due out of the house to which the Yarn was brought; and by the whole Court adjudged an unlawful distress.

A man cannot distrain for Rent but on the Land or House out of which it becomes due,  
and

and there he may take what he finds to whom soever the same belongs.

If a man distrains Beasts without cause and impounds them in a Pound overt, it's not lawful for the Owner to break the Pound; but must bring his *Replevin*.

If Beasts dye, or goods distrained for Rent perish, the Landlord may distrain again for the same Rent, and the loss of such Beasts so dying shall be loss of the Tenant if it be in a Pound overt.

If the Landlord be in view of Cattel; he intends to distrain for Rent, and the Tenant to avoid the Distress, drives the Cattel out of the Landlords Fee; Yet the Landlord may take them in or out of his Fee. Add it seems the same Reason if a man comes to a house to distrain for Rent, and be in the house and have sight of the Goods, and the Tenant to hinder the distress shuts up the Roomes, The Landlord may force open the doors, if the Tenant will not open them upon request.

If I grant a Rent to *I. S.* and his Heirs out of my Mannor of *D.* *Et obligo Manerium et omnia bona et Catalla mea super Manerium predictum existentia ad distringendum et per Ballivum Dni Regis*, The Limitation of this distress to the Kings Bailiff is void, and it is good to give a power of distress to *I. S.* the Grantee and his Bailiffs *Bacons Elem. of Law. 15.*

*Error*

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## Error.

**I**F a Writ of Error be brought and allowed, And the Plaintiff in the Writ of Error dyes *pendente breve* *Errore*, the Plaintiff in the Action may sue out a *Scire facias* against the Executors or Administrators of the Plaintiff in the writ of Error, without mentioning the Writ of Error, for that it is no *Supersedeas*, but only to privies, and not to Strangers.

When a Writ of Error is allowed, Execution upon the former Judgment ought not to be awarded; For by the writ of Error the Record it self is Removed, and the Court hath nothing whereupon to award Execution; Yet *supersedeas* the safest way.

If a man Levy a Fine *sur Conuſance de droit Come Ceo &c.* And suffer a Recovery of the ſame Lands, and there is Error in them both, He cannot bring Error firſt upon the Fine, becauſe by the Recovery his Title of Error is diſcharged and releaſed in Law Incluſively; But he muſt begin with the Error upon the Recovery, which he may do, becauſe a Fine executed barreth no titles  
I that

that accrue *de puisne temps* after the Fine levied, and so restore himself to his Title of Error upon the Fine.

If a man levyeth a Fine where he hath nothing in the Land which inureth by way of conclusion only, and is executory against all purchases and new titles which shall grow to the Conusor afterwards, And he purchaseth the Land and suffer a Recovery to the Conusee, and in both Fine and Recovery there is Error; this Fine is *Janus Bifrons*, and will look forward and Barr him of his Writ of Error brought of the Recovery; And therefore it will come to the reason of the first case of the Attainder, That he must reply that he hath a Writ also depending of the same Fine, and so demand Judgment.

## Execution.

**I**N Escape against the Sheriff, The Case was, That a Prisoner being in Execution, the Gaoler lets him out of Prison about his occasions, and after the Prisoner returns to the Goal, and another Sheriff comes in and then the Prisoner escapes and comes no more; It was held, That an Action did not lye against the last Sheriff, for the Prisoner was utterly discharged of the Execution by the first permissiom of going at large by the Gaoler.

The

The Sheriff may not break open the doors of any man to execute a *Fieri facias*, much less a Landlord to distrain by the same reason.

Judgment in Debt against three, and a *Capias ad satisfaciendum* against the Principal, the Sheriff returns *non est inventus*, upon which issued a *Scire facias* against the Sureties, and before the return the Principal came into Court and prayed his Body might be taken in Execution, which was done accordingly. *Mich. 10 Jacobi in C.B.* And with this agrees the Course of the Court of King's-Bench, and divers Presidents of this Court.

A Writ of Error was brought 4 November returnable 10 January, whereupon the Court was moved for Execution, because it seemed to be but for delay, in regard the Return is so long, (and with this agrees 4 H. 8.) an Execution was granted by the Court. *Mich. 16 Jac. in C. B.*

Of Estoppels and Conclusions.

**H**E who claims nothing by him that was estopped, shall not be estopped. As, two jointenants are disseised, the disseisor lets to the one, now he is stopped to say, that he hath another Estate than for Life. Afterwards he to whom the Land was so let, dyes, the other Jointenant shall

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have the Land, and he shall not be by that Deed estopped, for he claimed nothing by him who was estopped, by the Survivor.

If I am named *W. B.* and I bring my Action by the name of *J. B.* and recover by that name, afterwards if I will bring my Action against another person by my right name, he shall nor estop me by that Recovery of the same name; for if I had been estop'd, I should not have had my Action against the other person, but he that is party may estopp me well enough. 26 H. 6. 30 H. 6. et 10 E. 4. *confr.*

*Where he in Reversion or Remainder claims nothing by Tenant for Life, he shall not be estopped.*

**A**S, the Father disseiseth the Son, and Levies a Fine thereof to a Stranger, where Recovery is had against the Father, and afterwards the Father dyes, the Son enters, or he that recovers, or he that was party to the Fine between him and the Son brings an Affise, and the other pleads the Fine or Recovery by way of Estoppel: this is no Plea, because that notwithstanding that the Son is privy to him that was estopped, yet he claims nothing by him.

Where there is Lord and Tenant, and the Lord lets his Seignory to one for Life, the  
Tenant



Tenant for Life of the Seigniorie distrains the Tenant, and he bring an Action of Trespass against him, and he justifies, for that he holds of him by ten shillings of Rent; and the other traverses it, and it is found against the Lord for Term of Life; This shall be no Estoppel to him in the Reversion.

If a man pleads a Plea in which he confesseth a thing that is not material, it shall not be an Estoppel.

As if a man voucheth one as Son and Heir to such a person, and when he comes he is bound to warranty by his own Deed, yet may say afterwards in an *Affise of Mortdancestor*, that the same person which I vouched before as Son and Heir is a Bastard for the words *Son and, Heir*, in his voucher are not material.

The same Law in a Writ of Trespass brought by one Executor of Goods taken out of his possession.

Where a writ of Debt is brought by an Executor, who counts of a duty due to himself, there the word *Executor* is not material, and he shall not be estopped, but he may say afterwards that he never was Executor, nor ever administered as Executor.

*If a man will plead a Record to estopp him that was privy, he ought to shew what end the Action had.*

**A**S if I bring an Action against you in which Action you plead, that at another time, viz. such a day, &c. I brought an Action of Trespass against you, and the Defendant pleaded Villenage, and the Plaintiff confest it; he ought to shew further, by force of which he was nonsuited, and to shew what end the Plea had, and demand Judgment if against that he shall be answered.

*Where a man hath Judgment to recover Land, by that Judgment he shall be estopped to claim any other Title than he hath by the Recovery.*

**A**S if a man recover by Writ of Right *Sur disclaimer*, if the Tenant cealeth afterwards, he shall not have a *Cessavit* to recover the Land though he sues not out, Execution; for he shall be estopped to claim any other Title, or to have any other Action to recover the Land, than that by which he hath recovered; and by the same reason that he shall not have a *Cessavit*, he shall not have *Eschete*.

If a man hath Rent in Fee he may distrain or have a Writ of Annuity, and if he brings a Writ of Annuity and hath Judgment to recover, although that he sues not out Execution, yet he shall never distrain for the Rent afterwards.

Tenant in Tail discontinues for Life, and dyes, and the Tenant for Life aliens in Fee, and the Heir bring in *consimili casu* and recovers, now by this Judgment he shall never have a *Forfeiture* of the same Land &c.

The disseisor enfeoffs the disseisee by deed indented upon Condition, or makes a Lease for Life by Deed indented; this is a good Conclusion to the disseisee to demand his Right; and the Reason is, that by the Deed indented the disseisee hath affirmed the Estate of the Disseisor, which is as much as if he had confirmed his Estate before the Feoffment.

In Debt upon an Obligation the Defendant pleads a Release, upon which the Plaintiff is Nonsuit, afterwards the Plaintiff brings a new Action of Debt, the Defendant shall be estopped to say that he was *deins age*, or that the Obligation was made *per minas*: But it is otherwise if the Plea be discontinued.

An Essoin is cast for the Tenant in a Writ of *Dower*, yet the Tenant shall be received to say that he hath been allways ready to render

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der Dower, and because that an Essoin may be cast for a Stranger, this Essoin is no Estoppel; for an Estoppel shall be good to every intent, but because an Essoin may be cast for a Stranger as well as for the Tenant himself, it shall be said an Estoppel.

I bring an Assise of *Mortdancesfor*, and recover, when in Truth I have no Right, &c. yet the Wife of the same Father shall be endowed &c. Also in Avowry.

Tenant for life Aliens in Fee, the Wife of Tenant for Life shall be endowed against the Feoffee.

Also Tenant in Tail is bound by Statute and makes Feoffment, Execution against the Feoffee.

*Of some Estoppels none shall have advantage but those who are parties or privies.*

**A** Sif I loose Land by Erroneous Judgment or false Verdict, those that are Strangers shall have no advantage.

*But of some Estoppels every one shall have advantage.*

As Bastardy certified by the Bishop.

*User of Action is no Estoppel to prejudice another, viz. Heir Sec.*

**A**S a man grants a Rent Charge in Fee to an Abbot and his Successors, or to a Feme-Covert and her Heirs; if the Abbot or Husband brings an Action, it shall not prejudice the Successor or the Wife.

*In no Case one person shall estopp another but in Dower.*

**A**S where a Woman demands Dower, and she hath Writings touching the Inheritance of the Heir; for in debt it is no Plea to say that the Plaintiff is indebted to the Defendant in ten pounds, because that it cannot be tryed by the Original. 3 H. 6.

*In every Case where I am Barred of Land, as if it be found that I am not next Heir, this Estoppel shall pass with the Land, and every one that claims the Land by me shall be Estopped, but of other Lands it shall be no Estoppel against me. 33 H. 6.*

**I**F I bring a *Pracipe quod reddat* by the name of Richard, when my name is John, and recover by default against the Tenant, and afterwards I bring another Writ by my right

right name against the same Tenant, he shall not estopp himself by that Recovery.

So if I have misnamed the Tenant in the first Record, because he shall not be grieved by it. *Mich. 33 H. 6. contra per Prisot, contra per Fortescue. 34.*

By *Prisot* none shall be received to plead an Estoppel against another, but he that pleads may be estopped by the same plea; and this is where both parties are parties to the Record, otherwise not;

For if I bring an Action by the name of *Robert* (when my name is *John*) against one that pleads with me, if afterwards I sue him by the name of *John*, he shall estopp me by that Record; but against a Stranger I shall not be estopped by it; by *Prisot* and by *Fortescue*, 30 H. 6. 26 H. 6. 14 E. 4. *contra.*

Bastardy certified against me or found against me, every Stranger shall estopp me, because that every Stranger is estopped to say that I am *mulier*.

But if I am certified *mulier*, a Stranger shall not be estopped by it to plead special Bastardy, because that it may be that I am a Bastard in our Law, and a *mulier* in the spiritual Law, but not *contra*.

*No Stranger shall take advantage by an Estoppel, but where the Estoppel extinguisheth the Right.*

**A**S if a Man makes a Lease to me for Term of years of my own Land, and the Term passeth, and he enters and grants a Rent Charge in Fee, and afterwards I recover against the Grantor the Land by default, the Grantee shall not falsify the Recovery by Estoppel.

*A Stranger shall not take advantage of an Estoppel in fait, if it be in the Realty, but by matter of Record it is otherwise.*

**A** Man takes a Lease of Lands for years or for Life, of which Lands he himself is seised in Fee or in Tail at the time of the Lease made, if it be by Deed indented he is estopped to say that he had any Estate or Right in those Lands at the time of the Lease.

The same Law if a man be disseised, and takes a Lease of the disseisor for a term of years of the same Lands by Deed indented.

But if a man takes a Lease for term of life of his disseisor he shall not be thereby estopped, notwithstanding it be by Deed indented, because that by the *Livery* he is remitted,

ted, and the Lease is void, *ut dicitur, quere tamen*, for the Indenture is strong against him; but if it be indented, it is cleer Law: but if it be by Fine, it shall be an Estoppel, because that the Estoppel takes effect before his Entry; Or if *Livery* be made out of the Lands within View, &c.

If a man makes a Lease by Deed indented to one, of his own Lands, now he is concluded, after the Lease determines the Lessor enters by force of the conclusion, and a stranger comes in aid of him, the Lessee shall punish the stranger for this Trespass, and he shall not conclude him by force of the Lease, because he is wholly a stranger to the Judgment. *per totam Curiam, 14 H. 6.* But *quare* if he justify as servant, if he shall conclude himself.

**Fines**



## Fines and Recoveries.

**A** Fine was Levied of Lands in two Counties, and but one County mentioned in the Fine; yet because it was for the uses declared in an Indenture which did mention the Lands in the other County, all the Lands mentioned in the Indenture did pass.

If two persons having several Interests in Lands acknowledg the note of a Fine before a Judg, and then one of them dyes; The Conuisee may for all that proceed with his Fine against the other alone; for the death of the other is no impediment, for the Conuisee of every one is against himself, and shall work for so much as he can pass.

A man and his Wife acknowledged a note of a Fine before Commissioners (the 26th of March) by *Deditur potestatem*, and the wife dyed 27th of the same month; and the next day being the 28th, Composition was made in the Alienation-Office upon a Writ of Covenant Returnable in *Hillary* Term before, and the Kings Silver was entred as of the same *Hillary* Term, and so the Fine was past and

and ingrossed, And in *Easter* Term the Heir of the Wife moves against the Fine; But upon debate it was agreed the Fine should stand.

Tenant in Tail Levies a Fine with Proclamations, and 5 years pass in his Life-time; Yet this shall not Barr his Issue.

A man of full age, and his Wife being but 19, Levy a the Fine of Inheritance of the Wife, whereby an Estate is conveyed to the Husband and Wife in Tail, and the Remainder to the right Heirs of the wife; and many exceptions taken against the proceedings by the Heir to the Wifes inheritance, *viz. I. S.* as that the said Feme was not of full age at the time of the Fine Levied, and other undue means committed in getting out the Son; Yet by the whole Court the Fine was held good Law, for *Falta valent multa que fieri prohibentur.*

If there be Tenant for Life, the Remainder in Fee to an Infant; and they both Levy a Fine, and afterwards as to the Infant the Fine is Reversed, yet the Conusee shall have the Land for the Life of the Tenant; for each may pass and give what he lawfully may.

If there be two Jointenants; and one of them suffer a Recovery declaring the uses of the whole; this shall bind but only a Moiety, unless the consent of the other Jointenant can be proved.

Heir.

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### *Heir.*

**I**F an Heir be sued upon a Bond, and Lands are proved to descend unto him from his Ancestor, you must have a special Writ to enquire what those lands are worth to be delivered to the Plaintiff at a reasonable extent and price; and if the Heir confess the Action, and shew what Lands come to him by descent, Then his Body and all other his Lands and Goods and Chattels are free from that Execution, but if he deny the Action and plead *Riens per descent*, or it go by default against him, then Execution shall be against Body, Goods, or other Lands; And the Declaration shall be in the *Debet* and *Detinet*, as though it were his proper Debt.

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## Heir

**I**f an heir be tied upon a Bond, and  
lands are proved to descend unto him  
from his ancestor, you must shew  
that the lands are descended from those lands  
are worth to be delivered to the Plaintiff at  
a reasonable extent and price; and if the  
Heir denies the Action, and shew what  
lands come to him by descent, then the  
Body must shew all other his lands and goods and  
Chattels are free from that execution, or  
if he deny the Action and shew what  
lands, or if he go by default against him then  
Execution shall be against Body, Goods,  
or other lands; And the Decretion shall  
be in the Debt and Answer, as the Court  
were his proper Debtor.

## Outlawries and Outlaws.

**O**utlawry was pleaded in Barr, and day given before when the Defendant reversed it, the Defendant shall not be condemned for Failer of Record, but *Respond. Green against Gascoigne. vide Title failer of Record. Tel. 36.*

Outlawry in the Kings Bench reversed by Error in the same Court; but that is for Error in Fact, not in Law, as if no Outlawry lay in the Case; and if Process of Outlawry lie in an Action upon the Case, for turning a Water-Course, *vide P. 10. H. 7. pl. 15. Dy. 195. b. 196.*

Original in Debt, called the Defendant *Nuper de Lond. Exig.* called him *de Lond.* is erroneous; for it must pursue the Original without Variance, and the Original was against *Lancelot*, the *Exigent* was against *Lancelot* ill. 3 *Cro. 49. vid. 50, 95. 104. 116. 172.*

Error of a Judgment in Debt, and Outlaw'd. 2. on it against. 2. where the Sheriff return'd *quod non habent bona aut catalla; quod*

*summon potner.* it should have been *per quod*, &c. 2. it should be *nec eorum aliquis hei* 3. the Original is against Lancelot A. and the Exigent is against Lancelot A. 4. 'tis said in *Hastings*, and it should be in *Hastings de Com. plac.* & *revocetur Lancelot vers Jones.* 3. Cro. 50.

An Outlawry was reversed, because it was against *Lewellin* with a single *l*, and now the mean Process against *Llewellyn*, with a double *Ll*, and it was against two, and returned *quod non sunt inventi*, and not *nec eorum aliquis*. *Llewellyn* against *Watkins* vide *M.* 2. R. 3, 4, 13. pl. 16. 3 Cro. 85. 104. 49. 50. 116. 198. 240. 248. 205. *M.* 21. *H.* 7. pl. 37.

Exigent names no place where the Sheriff is to have the Body; and that adjudged Error to reverse the Outlawry: For the Sheriff cannot tell in what County to carry him. *Cesar* against *Stone.* 3 Cro. 104.

Outlawry reversed, because the Party was Indicted in *Com. Somerset*, and supposed to be of *London*; and the *Capias* awarded to the Sheriff of *Somerset*, where it ought to go to the County where he lives. *Rorset's Case.* 3 Cro. 179. vid. *Dj.* 295. b. vid. *M.* 1 E. 4. pl. 2.

One Outlawed of Felony, assigned his Term, and then reversed the Outlawry, the Grantee shall maintain Trespass for the Profits taken

ken

ken in the mean time, between the Assign-  
ment and the Reversal of the Outlawry:  
For though it was then the King's, yet it  
is now as if no Outlawry had been at all.  
*Ognett's Case. 3 Cro. 270. vide 218. Accord.*

Outlawry is not reversed but by plead-  
ing without Writ of Error, *per tot. Cur.*  
though there be apparent Faults in it. *3 Cro.*  
*274. vide Co. 1. Inst. 259. b.*

One is Outlawed, and has his Term sold,  
and then reversed the Outlawry, he shall be  
restored to the Term it self, not the Money:  
Otherwise, if sold on a *Fieri Facias, &c. quod*  
*vide plus Title Exec. Eyre against Woodfare.*  
*3 Cro. 778. Co. 5. Rep. 90. b. 1. Acc. pl. 285.*

In Debt, against an Executor, the Defen-  
dant pleads, that the Testator was Outlaw-  
ed, and doubted if a good Plea, because the  
Testator may have some Goods not forfeited  
by Outlawry, as simple Contract, &c. but  
on the other side, such special *Aff.* shall not  
be intended to *Com.* next he has nothing.  
*Wooley against Brade. 3 Cro. 575. 851.*

Outlawry reversed, because the Writ was  
*Teste Edmund Anderson*; so wanting a Title,  
had no *Teste*, which is the Warrant of it,  
*Growth and Jubam. 3 Cro. 592.*

Judgment against two in Debt, C. and B,  
and *Capias* only against one; and he Out-  
lawed; whereupon was brought Error, and  
reversed it, because the *Capias* should have

gone against both. Also 'twas not per *Judic' Coron' Beverly* against *Beverly*. 3 Cro. 648.

Debt against the Sheriff, on an Escape, where the Case was, that the Party was Outlawed after Judgment, reversed it by Error within the Year; and because he assigned not any Error, the Plaintiff took out a *Capias utlegatum*, and the Sheriff took him, and let him go, and resolved for the Plaintiff; and in Co. 1. Report of this Case the difference is taken of an Outlawry after Judgment, where the Plaintiff hath not over-stayed his Time, viz. the Year; but many have *Habeas Corpus*, or *Fieri Facias*, without *Scire Facias*: If the Prisoner be taken by *Capias utlegatum*, he shall be in Execution for the Party, without the Prayer of the Party, or Accord of the Court, if he will; but if it be after the Year, not without Prayer; 'tis the Course upon Outlawry after Judgment, if Error be brought to award a *Capias utlegatum*, if he does not assign Error; but if it be before Judgment, and the Defendant brought in, the Plaintiff must declare against him *de Novo*; and if one Outlawed after Judgment, bring Error, and comes to assign Error, he shall be committed to the *Marshalsey*, and find Security to reverse the Outlawry, and answer the party. *Lishton* against *Garpores*. 3 Cro. 706, 707, 850. Co. 5. rep. 88. 89. vid. 1 Leon. 51. 263. stat. 1 H. 7. pl. 6. Mo. pl. 772. 817. One



One recovers in *Quare impedit* against the Kings Presentee, and is Outlawed, the King shall have a *Scire Facias*, to have the Presentment; for the Church was immediately revested in him before any Writ to the Bishop; and though the King be not Party to the Judgment, he shall maintain the *Scire Facias* being Intitled by Act in Law, but the *Scire Facias* must mention the whole Record of the Outlawry: And so in Debt on a Bond and Judgment to recover, the King shall have a *Scire Facias*. *Beverley against Cornwall.* 1 *Leo.* 63, 64.

In Debt on a Bond, the Defendant pleads, that the Plaintiff was Outlawed by the name of J. S. of D. the Plaintiff replied, that at that time he dwelt at S. *absque hoc*, that he dwelt at D. he avoids the Plea of Outlawry; for he shall be intended another Person. 1 *Leo.* 87.

Upon an Exigent to *Lond.* it was return'd that he had proclaimed the party *de Com' in Com'* and for that the Outlawry on Felony was reversed: For it should have been *de Hustingo in Hustingum*. *Marshes Case.* 1 *Leo.* 326.

Outlawry of Murder, the King seizes Lands; and because the Outlawry was ill for the *quinto Exat'*, and was *ad comitatus* omitting *venum*: Wherefore to affirm the King's Title, the Attorney General prayed a *Certiorari* to the Coroner, to certify what

County (and on such a President shewed) granted. *Fumes Case. Latch. 210.*

Where one is Outlawed before the Justices of *Affine* or Justices of Peace, on an Indictment of Felony, the same Justice may award a *Capias utlegatum*: For they that have Process of Outlawry, have power also to award a *Capias utlegas per omnes Justit' Co.* 12. *rep.* 103.

Appeal of the Death of her Husband, and because some of the Defendants lived in another County, a *Capias* with a Proclamation issued to that County. The King dies, and Reattachment sued: If it be General, then a new *Capias* and Proclamation must go into the Foreign County, if Special, not; for the Statute has been once satisfied. *Vid. Co. 7. rep.* 90. *a. b. i E. 3. 43. a.*

In Appeal of Robbery, the Defendant was Outlawed, and Sued a Pardon, and *Scire Facias* thereupon. *Dicitur*, he ought to shew a Release of the Appeal before the *Scire Facias* be granted; then the Pardon to be Special, not General; but the Appellor, not appearing at the day of the *Scire Facias* returned, the Pardon was allowed; but at another day came the Appellor, and prayed Execution; but his Default being Recorded, could not have it. Note sometimes, the Pardon is General, sometimes *Ita quod stat nullus, &c. M. 2. R. 3. fol. 8. pl. 17. M. 9 H. 7. pl. 1.* One

One Outlawed of Felony, *duffus ad Bar-*  
*ram*, to say why Execution, &c. pleaded  
 that he was in Oxford Castle all the time;  
 and because he did not say in what County  
 Oxford is, nor did not say he was in any Bo-  
 dies Custody there, the Plea adjudged ill.  
*H. 11. H. 7. fo. 13. pl. 27.*

Baron and Feme Outlawed in Debt; he  
 brought Error; and after a special Pardon,  
*Ita quod stet rectius a Scire Facias*, and prays  
 it may be allowed; but the Court would  
 not till his Wife came in also, that the Plain-  
 tiff may declare against both; and then it  
 seems he may declare against them in the  
 Kings Bench, within the Equity of the Sta-  
 tute of 5 Ed. 3. tho' it say *rendre al Court*  
*donec le Exigent fiat sber'*, it went out of the  
 Co. B. but now 'tis in the Kings Bench by  
 Writ of Error. *P. 1 H. 7. pl. 7. H. 1. H. 7.*  
*pl. 19.*

One taken by *Cap' utleg'*, an Appellee of  
 Felony came in, and pleaded, that it was  
 against J. S. Gentleman, and he is but a Yeo-  
 man, and the plea allowed and a *Scire Faci-*  
*as* against the Appellor, who not coming in  
 he was discharged; so 21 *H. 7. pl. 16.* Out-  
 lawry against J. S. *de D.* he pleaded that he  
 lived at S. good without Error. *Vide 21 H.*  
*6. 20 and 23 H. 6. 4. 4.* Outlawry when re-  
 versed by plea, when by Writ of Error, 37  
*H. 6. 16. vide M. 21. E. 4. pl. 61. 21 E. 4.*

37. H. 5. H. 7. pl. 7. M. 6 H. 7. pl. 2. M. 21  
H. 7. pl. 27. Co. Ent. 689. 4 E. 4. pl. 15.

A. takes the Goods of B. who was Outlawed, if the King may seize the Goods of B. *vide* M. 6 H. 7. pl. 4. *vers. finem* and pl. 5. One that reversed an Outlawry, had a Writ *de bonis restituend'* to the Bayliff of *Westminster*, who returned, that he was not Bayliff, not good; he must answer to the having the Goods, and must deliver them, tho' gone out of his Possession, or shew Cause, M. 6 H. 7. pl. 5. b. H. 4. E. 4. pl. 3.

An Outlawry was reversed, because the Sheriff said, *ad Comitatus* *tent'* such a day, *in Comitatus Midd'*, and said not *Comitatus meum*, seems Error of Outlawry, because the Exigent was in R. 3. Time, and two Proclamations then, and the other three in H. 7. So the Exigent abated; but being in Felony, he must have *Scire Facias* against all the Lands, tho' *dictur* he had no Lands: For that must appear Judicially, and upon *Scire Facias*, though the Outlawry were reversed for the Default of the Exigent, he must answer for the Felony; otherwise if at Suit of the party he were discharged against him, H. 6. H. 7. pl. 7. M. 11. H. 7. pl. 33. M. 7. H. 7. pl. 7.

Writ of Error delivered before the Exigent awarded, and the Plaintiff Outlawed; yet it is not void, but voidable by Error, and Issue shall be joyned to try Delivery before

before the Exigent, but not by Jury, P. 10.  
H. 7. pl. 25, 31.

One may avoid an Outlawry, as well by saying he was beyond Sea, by the King's Command, as that he was a Souldier at Calais under such a Captain, and shall not shew the *Patent*; if the party appear upon *Scire Facias*, it shall be tryed in one Case by the Natives, in the other, by the Certificate of the Captain, M. 11. H. 7. pl. 17. P. 21 E. 4. pl. 4.

The Sheriff returns the Exigent thus, *Ad Comitatus tenentem apud C. in Comitatu Somerset.* 5. *Exactus non compernit*, because 'tis not said *ad Comitatus Somerset*, nor *Somerset*, set in the Margin: 'Tis held to be ill, because it might be the County Court was not held in the County of *Somerset*, but in another County, *sed adjournatur*, M. 11. H. 7. pl. 33. H. 6. H. 7. pl. 7.

One taken upon a *Capias utlegat* by the Name of J. S. Gentleman, says, he is a Yeoman, and was &c. *Scire Facias* against the Plaintiff, and issue, that he is and was a Gentleman, and the party was bailed; the King dies before the Issue tried; the party comes in Court, *temps* the next King, and is committed; for the Bail was determined, and the *Cap. utlegat* also, and a new *utlegat* awarded and returned; and then he pleaded the same plea again, and issue, for before  
he

he could not, all being determined, *M. 1. E. 4. pl. 7.*

Original against *W. B. Cap'* against *J. B.* and Outlawry shall be reversed by *Moyle. Danby contra. Et sic per Moyle*, if all the three *Cap'* had been against *J. B.* for then no *Cap'* had been against *W. B. quod Danby* denied, *M. 15. E. 4. pl. 17.*

Trespas and Judgment for the Party, and Fine for the King, and *Exigent* at the Suit of the King; and after two or three Courtiers of the King send a *Superfed'* under the Privy Seal, they proceed to Outlawry, but shall not prevail: for though the King have this Fine, by reason of the parties Suit; and if the party be taken, he shall be Imprisoned, and not discharged at the Parties Suit, if he will; yet, till he be taken, 'tis only the King's Suit, and the Parties have no Interest in it; and if the Defendant be Outlawed after the *Superfedas*, 'tis Error, and shall be reversed. *Pl. 4. E. 4. pl. 24, 36. Tr. 4. E. 4. pl. 4. M. 4. E. 4. pl. 14. H. 4. E. 4. pl. 3. vid. Co. 5. rep. 88, 89.*

The Sheriff returns the Copy of the *Exigent*, and not the Writ it self, with Proclamation, &c. he shall be Amerced for the Imbezlement of the Writ; and if the Party render himself to the Chief Justice in Vacation time, and get a *Superfedas*, whether he shewed it to the Sheriff or not, it shall be entered

ed in the Term; and the *utlegat'* discharg'd,  
*1 Inst.* 128. and *idem ibid.* 43. b. If Error be  
 brought of an Outlawry, and it appear  
 doubtful, a Special *Superfedeas* shall go to  
 the Sheriff, *quod capiat securitatem que les bi-*  
*ens ne servent illoine, vide 9 H. 6, 44. a. b.*  
*utlegat'* after *Superfedeas* void, and 7 H. 4.  
 1. a. if void, and the party shall be restored  
 to his Goods, 7 H. 4, 5, b. *Superfedeas* and  
*Exigent*; rules at the day, and a new *Exigent*  
 and a *Superfedeas*, the Outlawry after void,  
 H. 4. E. 4. pl. 3. Tr. 5. E. 4. pl. 13. *le Amer-*  
*cians'* 37 H. 6, 17. *vide 3 H. 4, 5. a. 8 H. 4.*  
*Caf. Prin.* 8 H. 4, 7. a. 11 H. 4, 34. a.

*Audita Querela*, by one in Execution, and  
 he offered in Mainprize the other, *ut amicus*  
*Curie*, surmised, that the Plaintiff is Out-  
 lawed; wherefore he ought to stay in Pri-  
 son for the King's Fine; wherefore he was  
 put to reverse the Outlawry, or sue a Par-  
 don, H. 6. E. 4. pl. 1.

The Plaintiff had sued three several Exe-  
 cutions against the Defendant, and brought  
*Superfedeas* for every one; but there was  
 granted an *Exigent* with Precept, that if a-  
 ny *Superfedeas* come to the Sheriff, he should  
 not allow it, P. 7. E. 4. pl. 20.

Error of an Outlawry in Debt, after Judg-  
 ment, because no Proclamation went into  
 the County where the party inhabited; but  
 being after Judgment, resolved, it need not,  
 but

but only in *Outlawry* and *Process* before App<sup>r</sup> but because in all the Proceedings she was named, A de B. and in the *Exigent* she is named *nuper de B.* and because it was *recuperavit versus eum* for *eam*, it was reversed, *Lady Gargrave against Markham*, 2 Cro. 516.

*Exigent* in *London*, and 'tis returned *quod ad Husting'*, &c. and recites a Form which was *ad Husting' de Com' plit'*, and that assigned for Error. 2. The *Exigent* is, that he *non compervnit*, and 'tis returned the same day it bears Teste; and that was held Error, *Archer against Dalby*, 2 Cro. 660.

*Outlawry* reversed, because the *Exigent* supposes, that *Robert* the Plaintiff did sue the said *Robert*, whereas the Plaintiff's name was *Thomas*; and Defendant being ready in Court, it was reversed immediately, *Jonson against Kite*.

One enters a Judgment, and then is Outlawed in a personal Action, then makes a Feoffment of the Lands; and he that has the Judgment, extends the Lands in the Hands of the Feoffee, and well: For by this Outlawry, the King has but a pternancy of the Profits, of which he is prevented by the Feoffment before Seisure, not if after Seisure; and if by Feoffment, after Inquisition found, before it be returned & *ibidem Opinio*, if the Seisure be *Virtute Officii*, Tenant after puts



puts the King out, not if seized *Virtute*,  
*Windsor* against *Savel*.

Outlawry against two reversed, because  
it's entred *ideo Utlegat' sunt*, and not *uter-*  
*que eorum Utlegat'* P. 15 *Caroli Secundi B. R.*

One Outlawed after Judgment, comes  
and pleads *Misnomer*, and has *Fieri Facias*  
against the party, and he returned *Mort'*:  
Another *Scire Facias* is awarded after, against  
the Executors, and Tryal of *Misnomer* in  
this Case shall not be by Averment taken for  
the King; but the Executors shall be made  
parties, because it Trenches to the whole  
Duty; but upon *mort' ret'*, no *Scire Facias*  
goes against the Executors; but the *Misno-*  
*mer* is tried between the King and the De-  
fendant, 21 H. 6. 21. a. 22 H. 6. 7. a.

In detinue of Charters, and other Wri-  
tings: As to the other Writings, the King  
waged Law; and then as to the Charters,  
he pleaded in Bar, by *Att' nolens volens* the  
pl. For of them concerning the Freehold, no  
*Process* of Outlawry lies, but Distress *infinite*,  
and 8 H. 6. 23, 30. *Utlegat'* lies not in  
Detinue for Charters and other Goods; for  
the Charters, draw the other Goods to them,  
21 H. 6. 42. a. 30 H. 4. b.

Upon a *Cap' utlegat'* before Judgment, the  
Sheriff may break open an House; but the  
Plaintiff sending a *Process* in another Man's  
Name, feigned an Outlawry where his Writ

was but a *Latitas*, 'tis an abuse of Process, and he Fined 50 l. *Hob.* 263. *Waterhouse* against *Saltmarsh*.

If one that is Outlawed for Treason, Peer or Peasant, be out of the Realm, at the time of the Outlawry, yet he cannot for that avoid it by Error, since the *Stat.* 26 H. 8. and 5 E. 6. as he might at Common Law, 3. *Inft.* 32.

By 26 H. 8. 13. Outlawry in Treason against persons beyond Sea, shall be as good, as if they had been in *England* at the time of the Outlawry, by 5 E. 6. 11. if within a Year after, the Outlawry pronounced, the party come into the Chief Justice, and traverse the Indictment, and be found not guilty, he shall be discharged of the Outlawry.

By the Award of the *Exigent* in Case of Felony, the Goods are forfeited; but that may be avoided by matter in Law, as if the Indictment, &c. be sufficient; or by Matter indeed, or Record he may excuse his Absence, as that he was beyond Sea, &c. 3 *Inft.* 232, 233.

If one taken by *Cap' uleg'* plead a plea triable *per pais*, for avoiding the Outlawry, as that he was commorant in another County, he shall be Bail'd, 4 *Inft.* 179.

No Goods are forfeited by the Judgment of the Court, till the Outlawry appear of Record,

Record, nor is the party disabled by Outlawry, till the *Exigent* be returned also; nor does any Writ of Error lie of it then 1 *Inst.* 288. *a.* 4 *Inst.* 266. *Dy.* 223. *a.* 6.

When Outlawry is pleaded in Debt upon a Bond, it goes upon a Bond, because there upon the King is to have the Obligation; but in Trespass, Contract, &c. not; because after the Outlawry pardoned, the party may have those Actions; and when Outlawry is pleaded in Bar, and failer of Record at the day, the Judgment is absolute; but in the 1. of *Cro.* in *Dawson's* and *Lee's* Case per *Barkley*, the Party might pray only, that he should answer over; and 2 *Cro.* Iron against *Gray*, if it be reversed before the day, &c. a respond' *Ouster*; and 1 *Inst.* when 'tis pleaded in Bar, day is given; but when in Disability, it must be shewed presently *sub pede sigilli*, and such Outlawry to disable the Plaintiff, must appear of Record, and the *Exigent* be returned, *vile* 8 E. 4, 6. b. *On.* 22. *Barnard's* Case. 1 *Cro.* *Dawson* against *Lee.* 2 *Cro.* Iron against *Gray.* 1 *Inst.* 128, 5. 4 *Inst.* 288. *M.* 4 *H.* 7. pl. 3.

Outlawry in *Chester* and *Durham* cannot disable the party at *Westminster*; Outlawry not pleadable in *Attaint*, nor in Writ of Error, to reverse the same Outlawry, 1 *Inst.* 128.

Return upon the *Exigent*, that he made Proclamation after Divine Service, ill, not shewing

shewing, there was no Sermon: For the *Stat.* appoints it to be done after Sermon, and if none, after Divine Service, *Ow.* 49.

The Sh. made a Lease to one Outlawed; and that he was Outlawed again; then came the General Pardon, resolved he was capable of a Lease, and by the Pardon, the Term forfeited, by the Second Outlawry revived; for a person Outlawed and pardoned, has property in his Goods, *Ow.* 116. Knowles against *Powel.*

All Outlawries are by 'Judic' Coron' naming them, excepting *Land*, else they are void but in *Land*, 'tis *ideo ut legat* of the principal Judgment *ipso facto* reverses the Judgment of Outlawry, 1 *Inst.* 288. b. *Pop.* 185. 2 *Cro.* 358, 528, 531, 521. 4 *Inst.* 247. *Dy.* 317. a.

Exigent against *Baron* and *Feme*; the Wife comes in, and prays a *Superfedeas*; doubted if she shall have it: For the *Process* must continue against the *Baron* and be stayed as to the *Feme*, till he be Outlawed, and then she shall be discharged, *sans jour*, and *vide* divers Proceedings in Outlawry against *Baron* and *Feme*, *Dy.* 271. b. 3 *Cro.* 611. *Hutt.* 86. 1 *Cro.* 42. *Smith* against *Asb.* 2 *Cro.* 445.

*Per Statute* 5 *Edw.* 3, 12. None Outlawed shall be pardoned, till the Party, at whose Suit he warned; yet upon two *Nichils*, or a *Scire Facias*, he shall be discharged; but then *quid remedium parti?* *Quare* when

when he is pardoned of an Outlawry before Judgment, with an *ita quod stet*, because he is to Answer to the Party; but when 'tis after Judgment, 'tis *ita quod satisfac' parti*, because he is to pay the Condemnation, *Dyer* 172.

Trespass by J. S. plea that he was Outlawed by the name of J. S. de D. he pleads, that he lives, and ever did, at S. it seems good: for it must be intended another person by *Little*: vide *M. 41 H. 6. pl. 19.* in an Action brought by J. D. plea that he was Bail for one by the name of J. D. Gentleman, and Outlawed on it: He replies, that he is a Yeoman, and held no plea: for if he entred the plea by that Name, he is Estopped; but the better Reason seems to be, that no Addition needed in the *Recogn.* because the Statute speaks of Original, *Tri. 10 E. 4. pl. 10.*

An Outlawry in *Chester* or *Durham*, is not pleadable at *Westminster*; for they have but private Jurisdiction *per se*; but an Outlawry in *Lanc'* here *per les Serjeants Com' lower Jurisdic' sit per Outlar' de Parliam'*, *12 E. 4. 76. a.*

One taken by *Cap' utlegat'*, pleaded that his Name is J. Stokes, not J. Stoke, as named; and prays *Scire Facias*; for the Plaintiff says, he is known by the one and the other Name, issue of it, and he left to Mainprize, *Tri. 14. E. 4. pl. 6.*

If there were no *Add* in the first Writ, there must be none *Exig*; for they must not vary, *Tr.* 16 E. 4. pl. 15.

Outlawry in an Indictment of Forestalling, reversed, because Parties of Outlawry lie not in that Case, *P.* 22 E. 4. pl. 13.

One Outlawed of Felony, comes in by *sepi Corpus*, and pleads *Misnomer*, and if he shall have it by plea, or be put to Writ of Error, and sue *Scire Facias* against the *Mein Lord*, doubtful by some he shall not avoid it by plea, for the disadv' of the Lords *alii* he may have *Scire Facias* on this plea; and if he should bring a Writ of Error, it must be by the same Name in the Record, which will be an *Estoppel*, *M.* 22 E. 4. pl. 22.

If a *Superfedeas* be sued, though not delivered to the Sheriff before the 5. *Exit*, the Outlawry shall be reversed; and so if delivered to the Sheriff who certifies the Coroner so; and yet because he appears not for him, they Outlaw him; shall be reversed; for the *Superfedeas* is of Record, 4 E. 4, 42. a. b. *Mo.* pl. 199.

The King makes a Lease to a person Outlawed; for the *Render* of Rent makes him capable as a Farmer; then he is Outlawed again; then comes a General Pardon; and it seems that restores him by the word *Damus* in it, against the Forfeit on the last Outlawry, and *ibidem*, the King makes a  
Lease

Lease to Commence from the Forfeiture, End or Determination of a former Term, the 1. *Leffe* is Outlawry, yet the 2. Term shall not begin, *Mo. pl. 378.*

One recovers in *Quare Impedit*, and before Execution is Outlawed, the King shall have a *Scire Facias* to present; for he cannot present, but is to prosecute the Execution of the Judgment; *sed* he is not privy to it. *Beverleys Case, Mo. pl. 378.*

If one forfeit a Presentation fallen by Outlawry, and the King presents, and he reverses the Outlawry, he shall have a *Scire Facias* and *outs* the King's Clerk: For by the Reversal he is restored to all that he lost as Principal, not Accessaries; therefore if the *Advowson* were appendant, and it becomes void, whilst the Mannor is in the King's Hand for Outlawry, and the King presents, he shall not avoid it, tho' he reverse by Error, nor Rent-Copy-holders put in by the King; and if it were an *Advowson* in Gross, and becomes void, whilst in the King's Hands, and the King presents, it seems he shall avoid it after Reversal, because the *Advowson* is the Principal thing, and the Presentment, but the usage of it. *Beverly against Cornwall, Mo. pl. 421. 3 Cro. 44.*

The Sheriff ret' *ad Com' Lanc' tent' ibidem*, &c. where it should be *ad Com' Lanc' tent' apud Lanc'*, or other place cert', and for

that the Outlawry was reversed, though *dict* many Presidents that passed *sub silentio*, Co. 4. rep. 95. a.

My Lord Co. says, the better Opinion of Books is, and so is his, that Debts by simple Contract, or for which one may waive Law, are forfeited by Outlawry, and with him his Heirs, agree the Judges *Pop. And.* and others, i *Inst.* 128. b. he says Debts, &c. which are certain are forfeited, not Damage, &c. uncert<sup>d</sup>; but so 10, 22. tis said, in Debt, on a Contract, Outlawry in Plaintiff, Abatement, because the Defendant not forfeited; but on a Bond tis pleaded in Bar, because the Defendant forfeited, Co. 4. rep. 93. a. 95. a.

My Lord Cook says, that at Common Law, if the Party was Outlawed, he was at an end of his Suit, and put to his New Original; yet he granted no *Capias* lay in Debt at Common Law; so it seems Outlawry lay where no *Cap* lay at Common Law. *Garner's Case*, Co. 5. rep. 58. a.

One Outlawed in Debt, after Judgment dies after the General Pardon, wherein tis provided none take Advant<sup>t</sup> of the Party that is Outlawed after Judgment, without satisfying the Plaintiff, and having the Pardon allowed in *Scire Facias*, yet resolved. First, here the Outlawry was pardoned, *quoad* the King, and may make Executors, and take Advantage of the Pardon.

Secondly,



Secondly, Here being no *Capias ad satisfac'*, which he against the Executors, nor no *Scire Facias*; therefore the Executors satisfying the Party, may plead it without *Scire facias*. Sir Edward Fetton's Case, Co. 6. rep. 79, 80.

Outlawry reversed, because the *Exigent* required the Sheriff to Arrest *ita quod habeat Corpus*, in Cro. Trin. and St. is of no signification: Dr. Drurie's Case, Co. 8. rep. 141. a.

One Arrested that had Priviledge, sues a *Superfedeas*, and after is Outlawed; there is a Nullity in all Proceedings, and the Outlawry declared void, without suing any Writ of Error, Co. 8. rep. 143. b.

Outlawry by *Ass't* being avoided by Plea, 'tis held by Cro. that its no Dermination of the Original; but he might have proceeded in the Original, suing another; but the first Original should have excused within the Statute of Limitations. Sir Thomas Finch against Lamb. Citer. Just. sembl. con. 1 Cro. 214, 215.

*Exigent* against three Men, and two Women, ret' *non comperuer'*, *ideo per Judic' Com' utlegat' existant*, ill; and reversed, because not said, *nec eorum aliquis comperuit*. 2. The Women ought to have been *naviati*. Middleton's Case, 2 Cro. 358.

It seems one cannot assign for Error, that he was beyond Sea at the time of the Outlawry pronounced; but time of the *Exigent*; For if after *Exigent* one fly, he cannot assign for Error, that he was beyond Sea; and if he do, the Attorney General may reply, that he departed after the *Exigit*. *Carter's Case*, 2 Cro. 464.

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*Partition.*

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*Partition.*

**I**F two have one Mannor in Common before *Partition*, the one is said to have *dimidium Manerii*; but after *Partition*, he is said to have *medietatem Manerii*: And so after *Partition*, if one of them be ousted by Force, the Indictment shall say, *medietatem*, not *dimidium Manerii*.

*Priviledge.*

**O**Ne of the Clerks of the Chancery lost his Priviledge, by suing out a *Superseas* in the *Common Pleas*: For by that Writ, he submitted to the Court there; and then his Priviledge shall not be allowed there.

*Parson.*

*Bish.* **I**F a Parson that hath a Benefice, be made Bishop of the same Diocese, and he accepts of the Bishoprick, the Parsonage thereby becomes void; for that he cannot Visit himself: So that a Man cannot have

two Benefices with Cure of Souls, *Simul & Semel*; but the first is void by Acceptation of the Second.

*Tith.* The Tith of those things which proceed from the Earth, as Hay, Corn, Apples, and such like, ought to be severed upon the Ground (or place where they grow;) but not so of Sheep, Pigs, &c. because they are of another Nature: And if a Man have Sheep in two Parishes, the Parsons of both Parishes shall have Tith of them. Willows, Horn-bane and Sallows are Titheable; but Timber-Trees, as Oak, Ash, Elme, &c. are not, nor the Loppings of them, *contra*, if they be fell'd or lopp'd before the Growth of Twenty Years, *per totam Curiam*, *Hill. 8. Jacobi in Communi Banco.*

*Plea.* If a Parson makes a Parol Agreement of his Tithes for his Life, and afterwards grants the same to another, who sues for the Tithes, Concord is no Plea in this Case; but by *Warberton* Justice, a Parson may grant his Glebe Corn before it be Sowed, and good for a Year. *Trin. 10. Jacobi in C. B.*

If a Parson gives 10 *l.* to the Patron, to present him to the next Avoidance, (the Church being full) it is Simony: So if the other give it to such intent. *Mich. 14 Jacobi in Communi Banco*: But if the Parson who is in by Simony dies, if the King shall present.

*quare*

*quare, et vide ibid' in Quare impedit inter Winccomb, et Episcopum Winton', et alios.*

## Of Pleas and Pleading.

**A** Bond was made and delivered as the Act and Deed of *A.* to *B.* for the use of *C.* which Bond *B.* offered to *C.* but *C.* refused to accept the same from *B.* yet *B.* left the same with *C.* to take, and the Bond being sued, *A.* pleads the whole Matter, and so not his Deed: And upon a Demurrer, Judgment and *Quer'.*

If the Condition of an Obligation be to pay 20 *l.* 7. *May*, and the *Obligor* pleads *solvit ad diem*, although he paid the said 20 *l.* to the *Obligee*, the 8<sup>th</sup>. of *April* before, it's a good Plea to say he paid it the 7<sup>th</sup>. of *May*: For if it be paid before, it's paid at the day in the Condition mentioned; and the Intent and Substance of the Condition, is observed and discharged.

Three are bound in one Bond, and every of them joyntly in the whole; the *Obligee* afterwards gets Judgment against one of them, and brings his Action against the other: This Recovery is no Barr; for it is no Satisfaction of the Debt; but an Execution is a good plea in this Matter.

Obligation dated 8<sup>th</sup>. of *December* (78.) and doth not say the Year of our Lord God,

nor

nor the Year of the King's Reign, the Date is void, and the Obligation good without Date: and the Plaintiff may count how the Bond was delivered to him any day when he pleases.

*Reg. 1.* Acts and Statutes in pleading need not be recited wholly, only the particular Branch that concerns the Matter in Hand, because every Branch is an Act of it self. *Secus* of a Record, for that is grounded upon an Original, and Judgment; and ought therefore to be entirely recited, when pleaded in Bar.

If Tenant in Tail of a Manor, whereunto a Villain is Reguardant, discontinue and die, and the Right of the Intail descend to the Villain himself, who brings *Formedon*, and the Discontinuee pleadeth Villanage. This is no Plea, because the Devesting of the Manor, which is the Intention of the Suit, doth include this plea, because it determineth the Villanage.

*Reg. 2.* Pleadings must be certain, that the Adverse Party may know whereunto to answer; or else he were at a Mischief; which Mischief is remedied by *Demurrer*.

If *tenant* in Ancient *Demeasne* be disseized by the Lord, whereby the Seigniorie is suspended, and the Disseizee bringeth his Assize in the Court of the Lord. Frank Fee is no plea, because the Suit is brought to undo the  
the

the Disseison, and so to revive the Seigniorie in Ancient *Demesne*.

If a Man be Attainted and Executed, and the Heir bring a Writ of Error upon the Attainder, and the Corruption of Blood by the same Attainder be pleaded, to interrupt the conveying in of the same Writ. This is no plea; for then he were without Remedy, ever to reverse the Attainder.

If Tenant in Tayl discontinue for Life, rendring a Rent, and the Issue brings a *Formedon*, and the Warranty of his Ancestor with *Assets* be pleaded against him, and the *Assets* is laid to be no other, but his Reversion with the Rent. This is no plea, because the *Formedon*, which is brought to undo the Discontinuance, doth inclusively undo this new Reversion in Fee, with the Rent thereunto annexed.

If a Man be attainted of two several Attainders, and there is Error in them both, there is no reason but that there should be a Remedy open for the Heir to reverse those Attainders, being Erroneous, as well if there were twenty as one.

And therefore, if in a Writ of Error brought by the Heir of one of them; the Attainder should be a plea peremptorily: And so again, if in a Writ of Error brought of the other, the former should be a plea, these were to exclude him utterly of his Right;

Right; and therefore it should be a good Replication to say, That he hath a Writ of Error depending of that also: And so the Court shall proceed, but no Judgment shall be given until both Pleas be dismissed; and if either Plea be found without Error, there shall be no Reversal, either of the one or the other; and if he discontinue either Writ, then shall it be no longer a plea: And so of several Outlawries in a Personal Action.

If Tenant in Tayl of two Acres, make two several Discontinuances to several persons for Life, rendring Rent, and bringeth a *Formedon* of both; and in the *Formedon*, brought of *W.* Acre, the Reversion and Rent reserved upon *B.* Acre; and so contrary, it seems to be a good Replication, that he hath a *Formedon* also upon that depending, whereunto the Tenant hath pleaded the Descent of the Reversion of *W.* Acre; and so neither shall be a Barr: And yet there is no doubt, but if in a *Formedon*, the Warranty of Tenant in Tayl with *Assets* be pleaded, it is no Replication for the Issue to say, that a *Precipe* dependeth by *J. S.* to evict the *Assets*.

An Attorney may plead *not informed* to an Action, if his Client doth not give him order to plead otherwise: For this will save the Attorney Damages in a Writ of Deceit, if it should be brought against him.



In an Action of the Case, if the Defendant plead to issue upon one part, and Demurrer to the other part, the Demurrer ought to be argued first, because the Jury at the Tryal, may give Intire Damages for the whole.

*Scire Facias* against *Marricaptor*, they plead, that after Judgment against the Principal, (*viz. 6th. die & anno*) the Principal brought a Writ of Error, whereby the Record was removed into the Exchequer, and that *pendente br' de Errore*, the Principal rendred himself to the *Marshall*, and there died; and this he is ready to prove, &c. This Plea is nought, because the Rendition ought to be tried by the Record. Secondly, The plea is double, and imports two Issues, the one the Rendring, and the other the Death. 3. The bringing the Writ of Error, is a *Superfedeas* to the Execution (and the Execution being suspended, during the Error, undetermined, and depending the Bail) was not sufficient Authority to bring them in: So that his Rendition is in vain, and nothing worth, and the Death is only answerable; which if true, is a Discharge of the Bail.

Reg. 3. In all Imperfections of Pleading, whether it be in Ambiguity of Words, and double Intendments, or want of Certainty and Averments, the plea shall be strictly and strongly taken against him that pleads it.

For

For Ambiguity of Words, If in a Writ of Entry upon Disseisin, the Tenant pleads Joynt-Tenancy with J. S. of the Guilt and Feoffment of J. D. Judgment, *del brief*; the Demandant says, That long before J. D. any thing had, the Defendant himself was seized in Fee *Quousque predict' id super possessionem ejus intravit*, and made a joynt Feoffment; whereupon he the Demandant re-enter'd, and was seized, until by the Defendant alone he was disseized. This is no Plea, because the word *intravit* may be understood, either of a Lawful Entry, or of a tortious, and the hardest against him shall be taken, which is, that it was a lawful Entry; therefore he should have alleadged precisely, that J. D. *disseisvit*.

Reg. 4. So upon Ambiguities that grow by References; if an Action of Debt be brought against J. F. and J. B. Sheriffs of London, upon an Escape, and the Plaintiff doth declare upon an Execution, by Force of a Recovery, in the Prison of Ludgate, *sub Custodia* J. S. and J. D. then Sheriffs in 1 H. 8. and that he so continued *sub Custodia* J. B. and J. G. in 2 H. 8. and so continued in *Custodia* J. F. and J. P. in 3 H. 8. and then was suffered to escape: J. F. and J. P. plead, that before the Escape at such a day, *Anno superius, in narratione specificat'*, the said J. S. and J. D. *ad tunc Vicecomites*, suffered him to escape.

This is noo good Plea, because there be three Years specified in the Declaration; and it shall be hardest taken, that it was 2, or 3 H. 8. when they were out of Office; and yet it is nearly induced by the *aditunc Vicecomes*, which should leave the Intendment to be of that Year, in which the Declaration supposeth them to be Sheriffs; but that sufficeth not; but the Year must be alleadged *in Fait*: For it may be mislaid by the Plaintiff: And therefore the Defendants Meaning to discharge themselves by a former Escape, which was not in their time, must alleadge it precisely, *Dyer* fa. 66.

Reg. 5. For uncertainty of Intendment, if a Warranty Collateral be pleaded in Bar, and the Plaintiff by Replication to avoid the Warranty, saith, he entred upon the Possession of the Defendant, *non Constat* whether this Entry was in the Life time of the Ancestor, or after the Warranty descended; and therefore it shall be taken in the strictest Sence, that it was after the Warranty descended, if it be not otherwise averred, 3 H. 7. 2, 3 *Plow.* 46. a.

For Impropriety of Words, If a man plead, that his Ancestor died, by Protestation seized, and that J. S. abated, &c. this is no Plea; for there cannot be an Abatement, unless there be a Dying seized, alleadged *in Fait*; and an Abatement shall not be improperly

perly taken for Disseisin in pleading: For Words make Pleas, 38 H. 6. a. b. 39 H. 6. 5, 6. Reg. 6. For Repugnancy in pleading, if a Man in *Avowry*, declare, that he was seized in his *Demesne*, as of Fee of 10 Acres; and being so seized, did demise the said 10 Acres to *J. S. habend'* the Moiety for twenty one years, from the Date of the Deed, the other Moiety from the Surrender, Expiration, or other Determination of the Estate of *J. D. qui tenet predicta medietat' ad terminum vite sue Reddend' 40 s. Rent*. This Declaration is insufficient, because that the Seisin that he hath alledged in himself, in his *Demesne*, as of Fee in the whole, and the Estate for Life of the Moiety is repugnant; and it shall not be Cured by taking the last, which is expressed to controul the former, which is but general and formal; but the plea is naught, and yet the matter in Law had been good, to have Intituled him to distrain for the whole Rent.

Reg. 7. A Bar may be good to a Common Intent tho' not to every Intent: As if Debt be brought against Five Executors, and Three of them make Default, and two appear, and plead in Bar; a Recovery had against them two of 300 *l.* and nothing in their hands over and above that Summ: If this Barr should be taken strongest against them, it should be intended, that they might have

abated

abated the first Suit, because the other three were not named, and so the Recovery not duly had against them; but according to the Rule, the Barr is good: For that by Common Intendment, it will be supposed, that the two did only administer: And so the Action well considered, rather than to imagine, that they would have lost the Benefit and Advantage of abating the first Writ.

Reg. 8. In pleading, a Man shall not disclose that which is against himself; and therefore, if it be matter that is to be set forth on th' other side. Then the plea shall not be taken in the hardest Sence, but in the most Beneficial; and to be left unto the contrary part to be alledged.

And therefore, if a Man be bound in an Obligation, that if the Wife of the Obligee, does Decease before the Feast of St. *John the Baptist*, which shall be in the Year of our Lord God 1598, without Issue of her Body by her Husband, lawfully begotten, then living; that then the Bond shall be void: And in Debt brought upon this Obligation, the Defendant pleads, that the Woman died before the said Feast, without Issue of her Body, then living: If this Plea should be taken strongest against the Defendant, then should it be taken, that the *Feme* had Issue at the time of her Death; but this

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Issue

Issue died before the Feast: But this shall not be so understood, because it makes against the Defendant; and it is to be brought in on the Plaintiff's side, and that without Traverse, *Dyer* 16, 17.

*Non dimisit* to an Action of Debt upon a Lease in Writing, was adjudged an ill Plea, and a Repleader awarded thereupon by the Court, *Mich.* 44, and 45 *Elix. Rot.* 158. in *Banco Reginae*.

If *J. S.* Covenant to make me an Assurance, I paying the Costs and Charges for making thereof, he shall not barr my Action of Covenant, by saying, he was ready to do it, unless he bring the Writings Ingrossed, and ready to Seal, and I refuse to pay the Charges accordingly.

Debt against an Executor, who pleads three Judgments of an 100 *l.* a piece; and that he had paid 40 *l.* in Satisfaction of two of the Judgments; and that he hath not, nor had, &c. *præterquam*, &c. the said 40 *l.* and 20 *l.* more, which is not sufficient to satisfy the other Judgment, upon which the Plaintiff demurred and adjudged for the Defendant; for its but in effect, a *plene administravit* specially.

Administrator *durante minore etate*, if he waists the Goods of the Infant, he shall be punished as an Executor in his own wrong.

If an Administrator brings an Action of Debt, and avers in his Declaration, how that Administration was granted to him at London, and the Letters of Administration bear Date in another place and County, the Plaintiff shall abate.

Upon a *Scire Facias* against two Executors, the Sheriff returns *nulla bona* against both, and *Devastavit* to the Value of the Debt against one of them; whereupon another *Scire Facias* issued forth, and Judgment was obtained only against him thereupon by Default, and after that a *Fieri Facias de bonis propriis* against him alone.

If there be two Executors, and the one of them confesses the Action, and the other lets it go by Default, or pleads *non est factum*, or *plene administravit*, Judgment shall be against both, *de bonis Testatoris*. Divers Executors are but in the Nature of one Person; For they all represent the Person of their Testator: And if the Action had been brought against him in his Life, he should have made but one Answer.

If Debt and Damages be recovered against one, and before Execution he dies; upon a *Scire Facias* against his Executor or Administrator, you shall recover only *de bonis testatoris*, and not *de bonis propriis*, because the Prayer of the *Scire Facias* is only *de bonis Testatoris*; and the Court will not

exceed the Prayer of your own Writ.

Reg. 9. The Defendant may plead an *Outlawry* in disability of the Plaintiff, before Imparlance; but after Imparlance, he cannot plead in disability of the Person; but he may plead it in Barr of the Action, 32 *H. 6.* 33. 35 *H. 6.* 36.

In a Writ brought by one, as Son and Heir to J. S. after Imparlance, the Tenant cannot plead to the Writ, that he is a Bastard, or that he is not Heir; but he may well plead it in Barr of the Action, 22 *E.* 4. 35.

An *Outlawry* is a good Plea in Barr of an Action of Debt: For by the *Outlawry* of the Plaintiff, the Debt, if it grow due by Specialty, is vested in the King; but *secus* of an Action of Debt upon Contract: For in that Case, the Debtor might wage his Law against the Debtee, who is Outlawed, 16 *E.* 4. 4.

By 10 *H. 7.* it seemeth, that an *Outlawry* goeth rather in Barr of the Action, than to the Writ; for there it is said, that where a Man cannot plead to the Writ, but by shewing of a matter in Bar, there he may shew it, and conclude to the Writ: For in an Action of Debt, a Man may plead *Outlawry* in the Plaintiff, and conclude to the person, and yet the matter goeth in Bar; and he may plead it also in Bar, and conclude to the Action, 10 *H. 7.* 11.

After



After a Voucher is counter-pleaded, and the Tenant put to another Answer, he may notwithstanding plead, that the Demandant is Outlawed; but after Voucher, the Tenant cannot plead to the Form of the Writ, 21 E. 4. 64. 5 E. 3, 223.

If a Man pleadeth, that the Plaintiff is an Alien born, or a Villain, or an Outlawed Person, it is left to his Choice, whether he will conclude these special Matters to the Writ or to the Action, 32 H. 6, 27.

If the Husband and Wife bring an Assize, and a Feoffment or Release of the Husband or the Wife; or of some Ancestor of one of them be pleaded in Bar, both of them shall be barred, 21 R. 2. Judgment 263.

An Exception taken to a Writ, *propter defectum Nationis, vel potius defectum Subjectionis ligeantie*, is peremptory, and the Action cannot be revived by Peace, or League subsequent. *Theoloal Digest' de Briefs. Lib. 1. Ca. 6.* The King may grant Licence to Aliens to implead; and that such Aliens as come into the Realm, by the King's License, and safe Conduct, may use Personal Actions by Writ, though they be not made Denizens. And Denizens lawfully made by the King's Grant, and such Aliens born which are within the express words of the Statute of 25 E. 3. may use Actions Real by Original Writ. *Theoloal ubi supra;*

If a Man be Excommunicated, and he sueth an Action Real or Personal, the Tenant or Defendant may plead, that the Plaintiff is Excommunicated: And thereupon he ought to shew the Bishop's Letters under his Seal, testifying the Excommunication; and then he may demand Judgment, whether he ought to be answered. But if the Demandant or Plaintiff cannot deny this, the Writ shall not abate; but the Judgment shall be, that the Tenant or Defendant, *eat inde sine die*; because, when the Demandant or Plaintiff hath purchased Letters of Absolution, and they are shewed to the Court, he may have a Re-summmons, or Re-attachment upon his Original, according to the Nature of his Writ, *Lit. Lib. 2. Ca. 11. Sect. 42.*

An Action upon the Case was brought, and the Plaintiff set forth, that a Jury was Impannelled and Sworn; and that one of the Jurors was challenged, for that there were not 12 Jurors. *Talis de Circumstantibus* was awarded, and another Juror Impannelled; and *so legitimo modo acquietatus fuit*; but this was held Erroneous *per totam Curiam*: For it doth not appear, that he was *legitimo modo acquietatus*, because he doth not say, that this other Juror was sworn, *Mich. 8. Ja. in C. B.*

Reg. 10. If a Man plead a General Act of Parliament, and mis-recite the same, yet it shall

shall not prejudice him, because the Judges ought to take notice of it, *per totam Curiam*; and *nul tiel Record* cannot be pleaded against a General Act of Parliament, although it cannot be found; *per Coke* Chief Justice, *ubi supra*.

Reg. 11. Note by all the Justices for a general Rule, where a thing alleadged doth confess and avoid my Plea, I may Traverse it, 7 H. 6. 13 Eliz. Dyer.

A Copy-holder pleaded, that *per Licentiam Dominorum Manerii adtunc existentium*, he made a Lease for Years, to J. S. and rul'd to be an ill plea; because he hath not shewn what Estate the Lords have in the Mannor: For they may be only Tenants at Will, and so cannot give License to make a Lease for Years, although they have Power to grant Estates by Copy.

A Man brought an Action of Trespass for his Horse taken: The Defendant said, that the Plaintiff gave him License to take his Horse; and farther said, that he was within Age at the time of the License, &c. Afterwards the Defendant said, that he was not seised long time before that the Infant any thing had, &c. and so possessed, until J. S. took and gave to the Infant. This is a good Departure, because that he doth not maintain his Barr, *sc.* his License, 5 H. 7.

Assise, the Tenant pleads, that his Tenant died without Heir, he shall not be received to say, that he committed Felony, for which he was attainted, because that it is new Matter, and not pursuant.

An Obligation did bear Date the first day of *May*, and was delivered the 20th. day afterwards; the Obligee releaseth the Second day of *May*; which Release was delivered the same day: This Release is no Barr, *quod nota*. If the Obligee brings an Action, and declares upon a Bond bearing Date the first day, &c. and doth not say that it was afterwards delivered the 20th. day, the Defendant shall barr him by the Release, which was made after the first day; and the Plaintiff shall not reply, and shew the first Delivery of the Bond the 20th. day; for that is a Departure, and because that he might have alleaded it it at the Commencement.

By *Keeble*, where the Defendant in Trespass fortifies his Bar; and there is no other Matter but pursuant to the Barr, and goes before the Barr in Conveyance of his Title: This is no Departure; but where the Barr is before the Matter shewn in his Rejoynder, this is a Departure: As in Assise, the Defendant pleads the Dying seised of his Father, and gives Color, &c. The Plaintiff pleads the reoffment of the Defendant after that Descent; the Defendant rejoyns, and saith, that

that Feoffment was upon Condition, which Condition was broken, and so he did re-enter. Now this is a Departure; for the Barr was before the Feoffment: But if the Tenant in Assise saith, that J. S. was seised, and enfeoffed him, and gives Colour, &c. and the Plaintiff saith, that J. S. disseised him, and enfeoffed the Defendant, upon whom he re-enter'd, and was seized until, &c. if the Tenant rejoyn, that after the Disseisin, he releas'd to the said J. S. and then he enfeoffed him. This is no Departure, and yet he might have pleaded it at first.

Also, if the Plaintiff plead a Feoffment upon Condition to J. S. and that the Condition is broken; and that thereupon he entered, the Defendant may say, that he releas'd to J. S. after the Condition broken; and then he enfeoffed him.

A Man pleads a Feoffment in Barr, in Assise of the Plaintiff; and the Plaintiff saith, that he Let to him for Life, and afterwards he made a Feoffment, by which he entered; the Tenant may well say, that after the Lease, and before the Feoffment, the Plaintiff releas'd to him: This is no Departure, because that it is pursuant; and yet it might have been said at first, 1 E. 4.

*Quare Impedit* against a Bishop, he pleads, that he claims nothing but as Ordinary, and demands Judgment, &c. The Plaintiff replies,

plies, that such a day he presented to him such a person, whom he refused; to which the Bishop rejoyns, that the Church was void (and shews how) and that thereupon he collated by Laps, Judgment, &c. This is no Departure, 35 H. 6.

In Assize, the Defendant pleads a Lease of the Plaintiff for Years, which is yet in being; the Plaintiff shews the Alienation of the Tenant; the Tenant saith, that the Plaintiff released to him after the Lease. This is a Departure, by *Marten*, 3 H. 6. *Precipe quod reddat*, the Tenant pleads, that J. S. was seized of the same Lands, and that they were devised to him in Fee; by Force whereof he entred, and gives Colour, &c. The Plaintiff saith, that J. S. was seized, and that he died seized; and that the Lands descended to him, as Son and Heir; and that he entred *cum hoc*, that he will averr, that the said J. S. was within the Age of 21 Years, at the time of the Devise. The Tenant rejoyns, that the Custom is, that every Infant of the Age of 15 Years may Devise; and that he was of the Age of 15 Years at the time of the Devise. The Court was of Opinion, that it was a Departure, 37 H. 6.

In Assize, the Tenant pleaded, the Dying seized by Protestation of his Father: The Plaintiff said, that J. S. was seized, and enfeofed him, and so seized, &c. To which the  
the

the Tenant replied, that his Father (by Pro-  
testation) died seized; and that J. S. did a-  
bate, and enfeof the Plaintiff; and that  
the Tenant, as Heir to his Father, entered,  
and was seized by *Fortescue* This is no De-  
parture, because the Tenant hath maintain-  
ed his Barr, and hath only added new Mat-  
ter to maintain it, 37 H. 6.

If a Man plead a Gift in Tayl in Barr, and  
the Demandant reply, *ne dona pas*; if he  
shew a Recovery in Value, it is no Depar-  
ture.

In Assise, the Tenant pleaded *hors de son*  
*Fee*; the Plaintiff shewed that the Tenant  
held of him *issint de son fee*, and the Defen-  
dant shewed a Release of all Right. This is  
a Departure, because this plea was a Barr,  
5 H. 7.

In *Formedon*, the Tenant pleaded, *ne dona*  
*pas*; the Demandant shewed a Recovery in  
Value *issint dona*; The Tenant shall not  
plead a new Barr, because that that would  
be a Departure; *quod nota*, 21 H. 6.

Reg. 12. In all Pleadings, where you claim  
as Legatee, you must surmise the Consent of  
the Executor, as *cui quidem dimissioni idem*  
*J. S. consentivit*. After Verdict the Plaintiff  
dies, viz. before the day in Bank; in Error  
brought, this is assigned for Error, and the  
Plaintiff *per Attornatum suum*, pleads, that he  
was alive; 'twas tried, and found that he was  
dead.

Argu-

Argued by Mr. *Allen*, That there was no Tryal proper for the Cause ; for that the Issue was joyned by a Stranger ; and that there ought to be a *Scire Facias* against the Executors, or Administrators of the Plaintiff ; and that the Writ of Error is discontinued.

But *per totam Curiam* the Tryal is good, and the Judgment revers'd for that Error in fact, Mich. 14 Car. 2. in B.R. *Dove vers' Dinkley*.

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*Quare*

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## *Quare Impedit.*

**I**N *Quare Impedit*, to present by Turns to an *Advowson* in Gros, Three Judges were of Opinion, that the Commencement, how it came presentable by turns, must be shewed: But two Judges were of a contrary Opinion, *Leek* against *Coventry*, 3 *Cro.* 111.

A Viccarage, and none presented to it for one hundred and sixty Years: Resolved, that all Viccarages are taken out of the Parsonage, and are not remitted to them by Non-usage, without some Act. *Robinson* against *Beadle*, 3 *Cro.* 873.

*Quare Impedit* by the King against *A.* he pleads, that the King made a Lease for Years, to *J. S.* and during the Term *J. S.* presented him, &c. And it was moved, that he being Incumbent, could not traverse the King's Title, without making one for himself; but shew that he came in by Usurpation during the Lease; but in the Writ, it was excepted, that the Patron and Ordinary are not named, but only the Incumbent, which they ought to be in all Cases, but that of Colla-

Collation; but because the Defendant shews, that he came in during the Term, in which Term the King could have no Right, it was adjudged for the Defendant. *Regina versus Middleton: vide Co. 7. rep. 26, 27. 25 H. 6. 62. a. 3 H. 4. 2, 3, 11.*

Writ against the Incumbent only adjudged ill, and abated, by 46 E. 3. *vide 7 E. 3, 11. 7 H. 4, 26.* Writ against the Incumbent only good, 1 Leon. 44, 45, 46. *vide 47. E. 3. 10, 11.*

*Quare Impedit*, and Counts of an *Advowson* appendant, that 'tis become void, and he presented J. S. The Defendant pleads, that 'tis in Gross, and Let to him; and that he presented J. S. *absque hoc* that 'tis appendant, the Traverse is good; but where the Count is of an *Advowson* in gross, &c. and the Defendant pleads, that 'tis appendant, there the Presentment is traversable; not that it is appendant: For the Presentment makes it in gross. Seignior *Buckhurst* against *Epm. Winton*, 1 Leon. 154.

In a *Quare Impedit* by Tenant for Life, Exception was taken, because he counted of a Presentment only in himself, and laid not any in his Lessor; but adjudged good: For the Lessor may lay a Presentment on his Lessee; therefore 'tis good for the Lessee. *Palmer versus Epm. Peterborough*, 1 Leon. 230. *Co. 5. rep. 57. b. 3 Cro. 518. vid. M. 7 E. 4. pl. 22. con. 8 H. 5. 4 Accord.*

*Qua-*

*Quare Impedit* against the Bishop and J. S. and Judgment; they joyn in a Writ of Deceit, and avoid the Judgment for *Non Summons*; and of that a Writ of Error brought and assigned, that they could not joyn, and Adjourned. *Guilliams* against *Blower*; *sed vide* 3 Cro. 65. They joyn in a Writ of Error on a Judgment in a *Quare Impedit*, 1 Leon. 293.

One that had a Benefice was presented to another, and then purchased a Dispensation; it came too late, and so the first was void; and if that be such as that it avoids the last *quare*. *Underhill* against *Savage*, 1 Leon. 316.

Queen *Mary* seized of a Rectory impropriate, granted *Advocationem Ecclesie*; the *Advowson* passed not: For being appropriate, it cannot be disappropriate, and the Rectory it self could not pass: For by the Appropriation, the *Advowson* is gone, and not in esse. *Eadem Lex*, if it were the Grant of a Common person. *Regina* against Lord *Lumley*, 2 Leon. 80.

A Common person presents to a Church, before Institution he may revoke it, and present another: But the King may revoke it after Institution, and before Induction, wherewith agrees *F. N. B.* 34 C. but says, a Common person having presented cannot revoke at all: And Mr. *Bacon* in his Reading on the Statute of *Simony*, in *August.* 14 Car. 2. held

held clear, that a Common person may revoke his Presentation; and so is 14 E. 4, 2. b.

By the Common Law, *Filius non potest succedere Patri in Ecclesia*; and therefore where the Patron presented the Son of the last Incumbent, the Bishop refused him; but that holds not in *England*; but the Patron presented another, whom the Bishop instituted, &c. The first got a Dispensation of the Canon, and sued the Bishop in the *Delegates*, and he prayed a Prohibition, and had it, though both Parties claim by one Patron; I suppose, because the latter Presentment was a Revocation of the first: If the Bishop will not Institute, &c. *duplex querela* lies, *Stoke* against *Sykes*, *Latch*. 191, 192.

*A.* brings a *Quare Impedit* against *B.* pending which *B.* was instituted and inducted; Then *A.* sues in the Spiritual Court to remove him, prohibition prayed; first, because he sues in *duplici foro*. Secondly, 'tis after Induction granted, *Oliver* and *Hussey*, *Latch* 205.

*Quare Impedit* and Counts of an Avoidance. The Defendant pleads, that the Avoidance was by Resignation; and that he had notice the Church continued void six Months, whereby he presented by Laps, ill; not shewing, that it was void six Months without notice, as it must be, not after the resignation; wherefore he amended it, *H. 1 H. 7. fo. 9. pl. 8.*

The Defendant in a *Quare Impedit* reversed a Judgment had against him for Default of a Letter of Attorney, and prayed a Writ to the Bishop, and could not have it till he made Title; *H. 1 H. 7. fo. 13: pl. 28.*

Three Mannors descended to three Sisters, to one of which an *Advowson* is appendant; they make Partition of all, except the *Advowson*, and assigned the Mannor, whereto, &c. to one, and another to each of the other, and say nothing of the *Advowson*; and if it be Appendant, or in Gross *alternis vicibus*, viz. Appendant when the Sisters Turn comes that has the Mannor, or in Gross *pro toto*: doubted; but the Opinion seems, that 'tis in Gross *pro toto*: For the Partition is as a Sale, excepting the *Advowson*; and if the *Advowson* had not been excepted, then clearly it had been in Gross: *vide Dyer 205.* A Church may be Appendant and in Gross, *alternis vicibus*, *M. 2 H. 7. pl. 16.*

In a *Quare Impedit* against a Bishop, he claims nothing but as ordinary: The Defendant pleads, that he presented *A.* and he refused him: The Plaintiff replies, that such a day before the Presentment, *J. S.* presented one, and then he presented, &c. whereby the Church became litigious. The Plaintiff Demurrs. The plea of the Bishop good. Secondly, If the Plaintiff thereupon might pray a Writ to the Bishop, *quare*; but the Court divided; but it was agreed, that the Bishop  
P might

might have pleaded this at first; and now has put the Plaintiff upon Title with a Stranger, whereas perhaps before he might have prayed a Writ to the Bishop, either himself, or the *Metropolitan*; but which *quare*: It seems a Departure, 34 H. 6, 11, 12. a. P. 5 H. 7. pl. 1.

*Quare Impedit* against a Bishop, and counts that he presented A. who was admitted, &c. and died, and the Church continued void for Six Months; the Bishop collated B. by lapse, and that A. died, so as it belonged to him, &c. The Defendant pleads, that J. S. presented B. to him, and traverses the Collation; and whether the Bishop in Suit against him, might set up a Title in a Stranger, to avoid the Plaintiffs Suit, was the Question? And it seems, he having the Cure of the Church, and to see that the Rightful Patrons do present, may; and hereby the Usurpation of J. S. the now Patron, is out of Possession. *Quare* if a Disturber may plead such a plea? Tr. 5 H. 7. pl. 2.

One grants *Omnia tenta*, if an *Advowson* passes, 'tis doubted: For it seems it cannot be held, because no place for a Distress; and therefore no Tenure of it can be: *vid. Trin.* 5 H. 7. 3. & Co. 1 Inst. 6. a. 19. b. 154. a. by what Name, Rents, &c. do pass; and *vide P.* 6 H. 7. pl. 5. some doubt if an *Advowson* may pass by Livery and Seisin, *semole non*, because a thing meerly in Grant; but the

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son may take Livery by the Ring of a Door, for his Induction, by way of Seisin: *vide H. 5 H. 7. fo. 37. a. per le livery and 12 H. 7. 16. Tr. 26 H. 8. pl. 1.*

Usurpation in the time of a Lessee for years of the Mannor, wherein, &c. it seems puts not the Patron out of Possession after the Lease, nor makes not the *Adversum* continue in force after the Lease ended, *P. 16 H. 7. pl. 6. Tr. 11 H. 7. pl. 19.*

*Quare Impedit* declares, that he presented *A.* to the Church, being void, &c. the Defendant pleads, that long before he presented *A.* and that he being in Possession, the Plaintiff presents him: it seems not good without a Traverse, that the Church was void when the Plaintiff presented him, *P. 11 H. 7. pl. 1.*

*Quare Impedit*, and lays a Presentation in *J.* who was seised, and that his Lands came to the King by the *Stat.* and the Church voided, and he granted to the Queen, the immediate Presentment, and also the next Avoidance: The Queen presents, and 'tis void again, and was disturbed. It seems, the laying these Presentments, makes the Declaration double; for one of them well makes a Title; but at last they judged not: And it seems, because the Statute is so high, that no Title can be precedent to it; so that what was laid in *J.* only was *Surplussage.*

*H. 13 H. 7. pl. 7. P. 16 H. 6. pl. 11. P. 13  
H. 8. pl. 2.*

In a *Quare Impedit* against the Parson, Patron, and Ordinary, they all joyn and plead one plea; and Exception taken by *Keeble*, that they have several Interests and Rights; and so ought to have severed in the Plaintiff; and none can plead to the Right of Patronage but the Patron, *H. 13 H. 7. pl. 24.*

In a *Quare Impedit* against two, one appears at the Distress, and the other made Default, and a Writ was awarded to the Bishop, *immediate quoad* him, and the Plaintiff proceeded with the other Defendant to Tryal, *P. 14 H. 7. pl. 1.*

If the Ordinary refuse a Clerk for disability, he is to give Notice to the Patron, if he be a *Lay-man*; but not, if he be a Spiritual Man, *P. 14 H. 7. pl. 3.*

In a *Quare Impedit* by the King, the Ordinary pleads, that such a one presented his Clerk to him, and he came to him as he was taking Horse, and bid him come again in three days, and he never came, and so permitted a Lapse: Resolved the Ordinary not bound immediately to examine the Clerk, but may take convenient time to do it in: for it may be at the present time, he is busied *in aliis agendis*; and though he pleads, that he presented (whereas his Collation) yet it seems well enough, *P. 14 H. 7. pl. 4. Tr. 15 H. 7. pl. 2.* That



That the Clerk has one or two Benefices already, is no cause of Refusal: For 'tis a Priviledge to the Clerk, and the Bishop is not to meddle in it; but Villein is a cause of Refusal, whereof Notice must be given, be the Clerk Lay or Spiritual, *Tr. 14 H. 7. pl. 2.*

Grantee of the next Avoidance, brought a *Quare Impedit* against the Patron and Ordinary, and recovers; but *pendente lite*, the Parson resigned, and another is admitted. This the Bishop returns on the Writ unto him; *Scire Fac'* Issue against the new Incumbent; objected it lies not; for he was to have only the next, not the second Avoidance; but resolved that the Church, *quoad* him, remains always void. Note *Co. 6. rep. 52.* that the Bishop ought to admit the Clerk on the Writ; and then the Tryal of Right, shall be between him and the Clerk, admitted *pendente lite*, and no *Scire Fac'* to be sued; but 2 *Cro. 93.* is contrary to that; *vide Dyer 260. Hob. 201, 320. H. 2 H. 7. pl. 7.*

He that pleads presentation by a Corporation, needs not to plead it by Deed, because it may be without Deed: For a presentation is but as a Letter Commendatory.

In *Quare Impedit*, 'tis enough to say, his Clerk was Instituted and Admitted without Induction, but in a Writ of right Induction, is

necessary, because he must lay the *Esples* in taking the Tythes, *Tr. 26 H. 8. pl. 7.*

Two Joynt-tenants brought a *Quare Impedit*; one will not prosecute, he shall be summoned and severed; but if he come and make another Title, all is gone; for they must joyn in the Title, *Trin. 26 H. 8. pl. 22.*

*Quare Impedit* by three Joynt-tenants, and make Title by a Grant to them, and *J. S.* And *J. S.* presented, and the Church is void, so it belongs to their Presentment; so they make Title of the presentment of one Joynt-tenant, *quod nota: vide Co. 1 Inst. 186. b. Accord. M. 21 E. 4. pl. 28. Mo. pl. 14. P. 27 H. 8. pl. 28.*

*Quare Impedit*, and counts that *A.* was seized, and presented, and gave in Tayl to the Ancestors of the Plaintiff, who presented, &c. And the Declaration adjudged not double, laying one presentment in the Donor, another in the Donee, *18 E. 3. 15. a. ad idem*, no more than if the Heir counts in a *Quare Impedit* of a presentment, by the Ancestors, and another by his Guardian. *Quare* if one lays a Presentment in the Feoffor, and another in the Feoffee, *P. 4 E. 4. pl. 3. M. 7 E. 4. pl. 21. 11 E. 4. 10. b. Co. 5. rep. 98. a. 14 H. 6. 15. b. 1 H. 5. 16. 40. E. 30. 10. b.*

*Quare Impedit*, and counts, that he presented the Defendant, and he deprived, &c. the Defendant pleads, that the Church was full

full of him by 6 Months before. No plea without traversing the Resignation; but what a Traverse 'tis, see 5 E. 4. 3. b. and 12 H. 4. 11. He needs not say, 'twas full by 6 Months before; for if he had, his presentment before, or pending the Writ, it shall abate, and he shall not have an Action for his Presentment, where he has had the Fruit of it before P. 4 E. 4. pl. 37.

If two present severally, the Ordinary is not bound to award his *Jure Patronatus*, without Prayer of the party, H. 8 E. 4. pl. 6.

In Annuity, the Defendant pleads, that he was presented by the King, and prays in Aid of him and the Ordinary: Oyer demanded of the presentment. *Resp.* It belongs to the Ordinary. *Danby*, There is a difference between the Bishop's *Collatee*, and the King's *Presentee*, Trin. 9 E. 4. pl. 14.

Composition, that if the Patron of a *simple Cura* present not within a Month, the Ordinary shall, if the Patron be disturbed, so as the Month past, he shall recover Damages for the two Years: For afterwards he hath lost his presentment, though the Ordinary has not presented; and so 'tis not like a Lapse at six Months at the Common Law, M. 13 E. 4. pl. 5.

One to name the other to present; he that names the Nomination, shall have the *Quare Impedit*; but if it be to name two, whereof

the other is to present one, the Presenter is Patron, because of his Election. *Quare* if he that has the Nomination name one, and revoke, can afterwards name another? And it seems he may, *H. 14 E. 4. pl. 2. Mo. pl. 147.*

*Quare Impedit*, the Incumbent pleads, that the Church is full, and has been 6 Months before the Writ: *Judgment del' brev'*, if no plea: Nor to the Action by an Incumbent, nor no other; but him against whom a Writ of Right of *Advowson* lies, *H. 16 E. 4. pl. 6. vide 48 E. 3. 19. b. 22 H. 6. 14.*

The Plaintiff hath Judgment in *Quare Impedit*, and a Writ to the Bishop; and before the Clerk is admitted, a Stranger brought a *Quare Impedit* against the Plaintiff, and has a *ne Admittas* to the Bishop; doubted which Writ he is to obey; and by *Littleton* and *Vavasor*, the first, because it is an Execution of a Judgment. *Fairfax contra*, the last is a *Superfedeas*, *P. 18 E. 4. pl. 36.*

*Quare Impedit*, the Plaintiff is *Non Suit*, after appearance, the Defendant makes Title, and has a Writ to the Bishop, *H. 19 E. 4. pl. 12.*

One may in some cases maintain a *Quare Impedit*, without alleading any presentment; As one erects a New Church, and presents to it, and is disturbed; yet the *Quare Impedit* lies *per Billing' & per omnes Justic'*, he that recovers in a Writ of Right of *Advowson*, shall

shall maintain a *Quare Impedit*, without alleading any presentment; so if enacted by Parliament, that one shall have such an *Advowson*: For, if a Church lapse, the Ordinary shall collate and maintain *Quare Impedit*, without alleading presentment, 21 E. 4. 3. a. b. and 17 E. 3. 13. b. 14. b.

*Quare Impedit* by the King, counts that *A.* was seized of a Mannor and *Advowson* Appendant, and Attainted of Treason, and Office found, that the King presented, &c. the Defendant makes Title to himself in Gross, *absque hoc*, that the King presented, and by some held, that the party may traverse the Kings Title in this Action, not traverse in *Chancery*, and the Presentment, not the Appendancy traversable, unless where they claim from the same person; but at last, almost all were of Opinion, that the Traverse of the Kings Title here, and not in *Chancery* is void; but *vide Co. 9. rep. 95. b. 96. a.* the presentment is traversable here, *M. 20 E. 4. pl. 11, 17. P. 21 E. 4. pl. 15.*

*Quare Impedit*, the Defendant pleads, *ne disturba p̄as*: The Plaintiff presently prays a Writ to the Bishop, and has it; and so is the 5 H. 7. 22. a. *M. 21 E. 4. pl. 42.*

*A. B. and C.* Joynt-tenants of an *Advowson*, they present *C.* by a strange name to the Church, and he is admitted, &c. by the Bishop, and is held a good presentment;  
*sed*

*sed vide* 10 H. 8. 14 a. Corporation present their Head, and 'tis held a void presentation; see *Mo. 45. accord' at principal case*, and *P. 17 H. 8. pl. 28. M. 21 E. 4. pl. 48.*

Three Patrons of an *Advowson*, agree to present by Turns, if one usurps one, the other presents in her Turn; yet it puts her not out of Possession; but if one be in Ward to the King, and he usurps in Right of one of the Parceners, it puts the other out of possession, because he not privy to the Partition; *per Choke and Bryan, sed Catesby contra*, because in Right of the Parcener, *P. 22 E. 4. pl. 3.*

*Void or not Void*, is tryable at Common Law; but *Full, or not Full*, by Certificate of the Bishop; and so is 40 E. 3. 20. b. 11 H. 7. 18. a. *M. 22 E. 4. pl. 3.*

*Quare Impedit* against *A.* as Patron, and *B.* as Incumbent, the Defendant pleads, that *C.* presented him not named; no plea: For here the Plaintiff has named one Disturber, and he shall not force him to name another; and *vide* 9 H. 6. 30, 31. a Disturber must be named; but contrary of an Incumbent: For that is at the Plaintiffs pleasure, *H. 22 E. 4. pl. 7.*

In *Quare Impedit*, Title was made by Acceptance, of a second Benefice, contrary to the 21 H. 8. and Issue taken of the Jurisdiction: And so it seems Admission and Institution

tution makes not the Avoidance till Induction, *Mo. pl. 45. Hob. 166.*

Owner of an *Advowson* grants, that whenever the Church is void, *J. S.* shall nominate, and he will present; each shall maintain a *Quare Impedit*; and if he that has the Nomination presents, he that should present, shall have a *Quare Impedit*, and *è contra*; and a Rent Charge granted, must be confirmed by both; but Aid shall be prayed only of him that has the Nomination; for 'tis in the Right, *Mo. pl. 147. vide H. 14 E. 4. pl. 2. Mo. pl. 1258. vide Mo. pl. 11, 78.*

*Quare Impedit* against Parson, Patron and Ordinary, who make default; the Plaintiff is forced to make Title; and then has a Writ to the Bishop, and another to enquire of the four points, and recover Damages against them all, because by the Default, all supposed Disturbers, *Mo. pl. 214.*

Barroness retains Chaplains; her Marriage after is no discharge of their Detainer, unless the Husband actually discharge them; but Attainder either in Man or Woman, is a Discharge, *Rex vers' Epm' Peterborough, Mo. pl. 924.*

Resolved, the *Advowson* of the Vicaridge is properly appendant to the Rectory, but may be to the Mannor; as if the Mannor and Rectory were both in a Hand before Appropriation; and at the Appropriation, the  
Lord

Lord reserved the *Advowson* of the Vicaridge; but that must be shewed either by the Appropriation, or usual Continuance, which is an Evidence of it, Sir George Shirley against Underbil, *Mo. pl.* 1258,

*Quare Impedit* against the Bishop and another, who demurred Judgment for the Plaintiff, *et Epus' in Mia*, and Writ to enquire, 7 E 3. 30. a. Writ to enquire of Damages on Demurrer and Judgment, *et Epus' in Mia*: And that assigned for Error, because he is twice amerced: Resolved none; for, First, The last is but a Recital of the first. Secondly, The first however is good at Common Law, and the Plaintiff may take it at Common Law, without Damages if he will; wherefore 'tis affirmed. *Specot's Case*, Co. 5. rep. 58. b. 59. a.

*Quare Impedit*, and the Writ was *Ad Ecclesiam*, and the Count was, *de Advocations duarum partium*; and well: For the Writ must be General; but the Count must be according to his Title. *Windsor's Case*, vide Co. Ent. 489. a. 3 Cro. 687, 688. Co. 10. rep. 13. b. 1 Inst. 17. b. 18. a. vide 2 Anderson pl. 16. Writ, *quod permittat presentare ad duas partes Ecclesie*, and Counts of the *Advowson*, that *due partes & bene aliter*, if the Count had been *de duabus partibus*, Co. 5. rep. 102.

A Tenant for Life Remainder to B. presents his Clerk, &c. and after sues him to Depriva-



Deprivation for not reading the Articles. *A.* dies, and two years after, the King presents by Lapse; and then the Clerk of *A.* dies, and *B.* presents. Resolved first, That the Patron is not bound to take notice of the Deprivation, though at his Suit; but 'tis to be given by the Ordinary to the Patron; and not only a General, but publick Notice. Secondly, Though the Church be so void, for not Reading, as a Parishoner may plead it against the Parson, in Debt for the Tithes; yet the Patron is not to take Notice before it be given. Thirdly, The King mistakes his Title, his presentation is void. Fourthly, The Institution and Induction, &c. thereon had, are void, and the Church remains so void; to that *Hob. 203.* *Dr. Griffith's Case. B. R. 14 Car. 1.* Fifthly, If a Common Parson usurp upon the King, and his Clerk be inducted, the King is put to his *Quare Impedit*; but a double or treble Usurpation, gives only the possession, not the Right from them. Sixthly, Without presentation, the Patron cannot be put out of Possession: For Collation may put one that has Right to collate, out of possession; but not one that has Right to present: And so 'tis agreed after, *fo. 50. in Boswell's Case.* And note, if the Presentation be in the time of War, though the Admission, Institution and Induction, be in Time of Peace, all is void. *Green's Case, 2 Cro 385.*

*Quare*

*Quare Impedit* against the Bishop and Clerk, omitting the Patron. Resolved, it shall abate : For the Patron only at *Common Law* could plead, and must be named in every case, unless where the King presents, who cannot be sued; and unless it be in such a case as the Patrons Right is not concluded, but only the presentment recovered; and if it be brought against the Clerk and Patron, and the Patron does plead to the Writ, it shall not abate, nor shall it if brought by Baron and Feme, or two Parceners, or Joynt-tenants, and the Feme, and one Parcener or Joynt-tenant dies. *Hall vers' Epm' Bath,* and *Martin, Co. 7. rep. 25, 26, 27.*

*Quare Impedit*, the Defendant pleads, that he had been in 6 Months, and traverses the Avoidance; Issue of it: Jury find for the Plaintiff, and enquire of the three points: First, That the Church was full of J. S. a Stranger. Secondly, That 'tis of Eighty pounds value. Thirdly, That the Action was brought within six Months after the Avoidance, and Judgment, *quer'*, and Writ to the Bishop, to admit his Clerk nominated. The Plaintiff by J. S. pending the Writ, and resolved in Error on it, first at *Common Law*, if an Usurper presented, and had his Clerk admitted and instituted, the plenary shall be tried by Certificate, because no induction, the Patron had lost his presentati-

on *pro hac vice*; for the Clerk could not be removed, and was put to his Writ of Right for the *Advowson*; but at *Common Law*, the King might remove the Incumbent of an Usurper by a *Quare Impedit*; for *nullum tempus occurrit Regi*; but could not present: No removing him without *Quare Impedit*, if inducted. Then comes the Statute, and excuses the Infant, and Feme Covert, that they should not be bound by an Usurper; but after the Disability removed, they may have the same Action the last Ancestor might have had. *Eadem Lex*, if Tenant in Tail, in *Dowry*, by Courtesie or for Life suffer an Usurpation, he in Reversion claiming by Descent has the same remedy: So in case of Usurpation, in time of Vacancy of a Bishop, &c. But the Statute revests not the Right; but gives a possessory Action, to recover the presentation thereof. Where one usurped on an Infant, who at Age Aliened the Mannor, his Alienee could have no Action for the next Avoidance, because the *Advowson* passed not, nor had himself any Remedy after; but where Tenant for years brought *Quare Impedit*, and was barred, yet it barred not the Right of him that had the Freehold. Secondly, it makes plenarty no Barr in *Quare Impedit*, or *Affise de darrein*. Presentment, if brought within half a year after the Avoidance, though not so soon ended. Third-

Thirdly, It gives Damages. Infants, &c. by purchase are not within the first, and the Issue of Tayl is within the Equity of the first Branch: because Tayl made the same Parl. which divided the Estate, and takes away his Writ of Right at Common Law, the three points were not enquirable; but now they are *ex officio* at the Common Law. No Plaintiff recovers Damage, nor the King now, because not within the Statute, which was made to help them that lost the presentment. *Si tempus semestr' transiit*, which the King did not; yet the Declaration for the King ever counts for Damages at the Common Law, if the Defendant present *pend'* the Writ, his Estate was to be removed: So if a Stranger usurp, *pend'* the Writ; and in all cases, he that came in pending the Writ, if not by good Title, though by presentment from the King; and since the Statute no Incumbent made before the Writ shall be removed by it, unless named in it, and in the case at Bar resolved the Incumbent that came in *pendente lite*, is to be removed, *viz.* the Writ is to be to the Bishop, to admit the Plaintiffs Clerk, and he cannot return plenarty; and then the parties shall try it between themselves *viz.* if he that came in *pend' lite*, had good title he shall stay, else be removed; but in *Cro. rep.* of this case, 2, part 33. 'tis held the Bishop ought to return plenarty; and there-  
on

on *Sci' Fa'* go against the Incumbent, and therein to shew his Right, *Boswell's Case*; but 1 *Cro.* 423. Writ to the Bishop for the Plaintiff, and to remove the Incumbent inducted. *Co. 6. Rep.* 49, 50, 51, 52.

If the Plaintiff be Nonsuit, or discontinue 'tis Peremptory, and a Barr in another *Quare Impedit*; First, because the Defendant on Title, is to have a Writ to the Bishop; but if it be abated for false Latine or Insufficiency, found by the Clerk's Fault, within six Months he shall have a Note; so if the Plaintiff or Defendant be misnamed, and the Plaintiff confess it, for it may be the Clerk's Fault; but if he take on him the Order of Knight-hood, 'tis peremptory. *Sir Hugh Portman's Case, Co. 7. rep.* 27. b.

*Quare impedit ad Medietat' Ecclesie*, good: When there are two Patrons and two Parsons in one and the same Church, yet it seems he may have it also *ad Ecclesiam*; but when there is but one Parson, though the Patronage be in two several hands, it must be *ad Ecclesiam*, and in a Writ of Right of *Advowson*. When the Church is divided amongst Parceners, the Writ of Right shall be *ad Medietatem Advocationis*; but where two several Persons are to present two several Parsons to one Church, each whereof is to have the half, the Writ must be *Advocationem Medietatis*, for the *Advowson* is entire, but the

possession several, which make the Difference between the *Quare impedit*, and the Writ of Right of Advowson. *Richard Smith's Case*, Co. 12. rep. 136. vide Co. 5. rep. 102. 1 Inst. 17. b. 18. a. vide 33 H. 6. 11. 6.

*Quare Impedit*, The Defendant pleads, that he is *Persona Impersonata*, good; without saying that he was so the day of the Writ purchas'd, for it shall be intended to relate to the Writ; and if he was not so at the time of the Plea, 'tis good, and has made the Writ good. *Lady Chichesley against Thompson*, 1 Cro. 75.

*Assise de Darrein presentment in Wales*; The Jury fine the Church 80. l. value; and *Tempus semestre modo praterit*, but say not how long since, yet good, and forty pounds Damages given; the Court of Grand-sessions Writ to the Arch-bishop, to admit &c. and *Quia Episcopus est pars*, doubted if they may; but it seems, now they may, since the Court of Grand Sessions is one of the King's Courts, but when they were in the Marches they could not. *Urse against Ep'm St. David*, &c. 1 Cro. 249.

*Quare Impedit*, The Defendant pleads, that he was admitted, instituted, and inducted, &c. and the Plaintiff traverseth the Admission and Institution, and for that was forced to reply, and traverse the Induction alledged; for that must be where 'tis alledged, be-  
cause

cause it alters the Tryal, and makes it be *per pais*; then it was moved, after Verdict the Bishop was dead, and that the Plaintiff might have his Judgment against the rest, and so he had it. *Stevens against Facon*, 1 Cro. 276.

*Quare Impedit*, and counts that *A.* was seized, and presented *D.* who died, and he presented the Plaintiff; the Defendant pleads, that long before *A.* was seized, *Qu. Elizabeth* was seized, and presented him, and he was admitted and instituted Plaintiff, traversed that the Plaintiff was admitted &c. upon the Queen's Presentment and Good, without traversing the Queen's Seisin. *Sir John Dryden, &c. against Yates, &c.* 1 Cro. 423.

The way to stop Strangers from Presentment, *Pendente brevi*, is to sue a *Ne Admittas*, and then the Plaintiff may remove him by a *Quare incumbravit*; else he is put to his *Scir' Fac'*; and if the person present *Pendente brevi*, he shall barr the Plaintiff in a *Scir' Fac' per Poppari*, and not denied. 2 Cro. 93.

The King grants the Mannor, the Church Appendant being then void the presentation passes not, except by special Words: *Phane's Case*, 2 Cro. 198.

One sued in the Deligates to avoid an Induction, supposing the Institution void; was prohibited; for Induction being a temporal

Act, and tryable at Common Law, is not avoided but by *Quare Impedit*, but this Prohibition not to be granted, having *Hutton's Quare Impedit*, because of his own shewing, it should abate it; but he must make his Surmise in the Deligates, without mentioning that *Quare Impedit*. *Hob. 15. Hutton's Case.*

Prohibition to the Incumbent, that pending the *Quare Impedit*, felled Timber upon the Gleeb. *Hob. 36. Kent against Drury.*

Where one brings a *Quare Impedit*, and his Title arises merely by Usurpation, he must not declare generally, that he was seised in Fee, for that was false, and so he might be tryed by the Defendant's traverse of the Seisin; but he must lay his Case as 'tis, that *A.* was seised, and the Church voided, and he presented, and now the Church being void, he presents again. *Hob. 103. Digby against Fitzherbert.*

*Quare Impedit* against the Bishop of Exeter and *A.* and *B.* they plead, that he has another *Quare Impedit* depending against the Bishop, and *A.* and aver it to be the same Plaintiff, the same Avoidance and Disturbance, &c. and demand Judgment. The Plaintiff says, that after the first Writ he presented *C.* to the Bishop, and he refused, which is the Disturbance; whereupon he new declared, the Defendant demurrs, whereupon



upon the Writ abates, for he shall not have two Suits at once, and here was a Disturbance laid in the first Action, so the new Disturbance mends not the Plaintiff's Case; so if he had new brought an *Affise of Darein Presentment*, the *Quare Impedit* depending, had been a Barr. St. Andrew against *Epm' Ebor.* Hob. 184. Noy 18. 9 H. 6. 68. 73. 22. E. 3. 4. Hob. 137. E. Bedford against E. Exeter, &c. Dy. 93. a Hnt. 3. 4.

Before the Stat. 25. E. 3. Stat. 3. Cap. 7. No Incumbent could counter-plead the Title of the Plaintiff, because that was Title to the Patronage, and with that he had nothing to do, but to avoid the Patron's Confession of the Action. Counter-plea was given by that Stat. but as *Amicus Cur'* he may shew false Latine in the Writ, &c. for that is no pleading, and the general Issue every one might plead for, thereupon the Plaintiff may pray a Writ to the Bishop. p. 3. H. 7. pl. 1. ad ult'. Hob. 61. 62. Co. 7. Rep. 26. 2.

If he that has one Benefice in Cure, take another, if it be not inducted, the Patron may at his pleasure take the Church to be void or not void, for 'tis not within the Stat. 21. H. 8. till Induction, Hob. 166. *Winchcomb's Case*, Mo. pl. 45.

In *Quare Impedit*, where one of the Defendants pleads himself inducted at the King's presentment, and after, surmised that he was

not Inducted, and prayed a Writ from the King to the Bishop; and because without Induction the Defendant could not plead, and the King could not be made a Defendant; therefore a Writ was made for the King, with a special Entry in the Judgment, that the Defendant was not inducted, *Hob. 193. Winchcomb against Dobson.*

Presentment *pend'*, the *Quare Impedit* does not abate the Writ. *F. N. B. 35. b.* but if the Church be full the day of the Writ brought, it abates, because 'tis false, which says, *que vacat* &c. *Hob. 194. Winchcomb against Pulliston.*

*Quare Impedit*, the Defendant and Ordinary agree in a plea of presentment by lapse, the Plaintiff replies, that he presented his Clerk, and the Ordinary refused him, and collated the other Defendant; the Plaintiff demurs for doubleness of the plea, because he says, he did not present; which is an *Affirmative* against the Ordinary's *Negative*: He says farther, that the Ordinary refused and collated; but the plea held good: For he must lay a Refusal to make good the Disturbance; and shewing the Collation is but Aggravation and Surplussage, and the only material part of his Replication, was, that he had presented a Clerk, *Hob. 197, &c. Brickhead against Archbishop of York.*

*Quare Impedit*, laying distrefs General, the Ordinary and Defendant make Title by Collation for Lapse : The Plaintiff replies, shewing that he presented, and the Ordinary refused, 29 *May*, whereas his Writ bore date the ninth of *May* ; Judgment must be against him : for though the count was General, yet the Replication applies it to a more particular Disturbance, since his Writ brought : So of his own shewing, he had then no cause of Action, and the Court must judge upon the whole Record, *Ibidem*.

*Quare Impedit*, the Ordinary pleads nothing but his ordinary plea, as Ordinary ; he shall not be amerced, making no Disturbance ; but the Plaintiff shall have Judgment against him *pro falso Clamore* ; but if the Ordinary cast an *Essoin*, 'tis a Disturbance, *Ibid*.

If the Patron bring a *Quare Impedit* before any Disturbance, and after surcease his time, *per Hob.* the Ordinary shall not be debarred of his Lapse, *Ibid*.

*A.* brought a *Quare Impedit* against *B.* pend' the Writ ; a Stranger gets in *C.* his Clerk ; and then *A.* has a Writ, and his Clerk admitted, thereupon ; yet if *C.* have better Right, he shall retain the Benefice, *Hob.* 320. *Dy.* 364. *ibid.* 201. 2 *Cro.* 93. *b.* 6 *rep.* 52. 4. *vide H.* 21 *H.* 7. *pl.* 7.

The Church is void, *A.* and *B.* severally pretend Right, present their Clerk ; the Or-

dinary refuses both. *A.* brought *Quare Impedit* against the Ordinary, and *B.* and his Clerk the six Months Incur: The Ordinary collates by Lapse: *A.* recovers, he shall remove the Ordinary's Clerk, *Hob.* 214.

No Infants, nor Woman's Release by the Statute, *Westm'* 2. 5. against Usurpations, made against them (during Infancy or Coverture) but for such *Advowsons* as they have, as Heirs, and not as Purchasers or Successors of single Corporations, are relievable within the Equity of this Statute; an Heir out of the Ward as well as within, and an Heir in Soccage upon a double Usurpation, before he comes to the Age of 21 Years (not if the Guardian surrender to him, or Institute *in ventre sa mere*;) and the Purchaser may be within the Statute; as if the King grant the *Advowson*, and one usurps: For he is in *loco Hered'*, and *per Hob.* an Heir of him in Remainder, as well of him in Reversion: *vide 2 Inst.* 359. and so it is of Tenant in Tail; but if the Heir himself of full Age, make a Lease, and the Lessee suffers Usurpation, that is out of the Statute: For the Lease must not be made by the Heir himself but his Ancestor: So if a Bishop suffer an Usurpation, being in Succession, his Successor shall not have a *Quare Impedit*; but if it were in time of Vacation, he shall; and the King upon this Statute, may present at the

the next Avoidance, *H. 239. Lord Stanhop*  
 aginst Bishop of *Lincoln, 2 Inst. 358, 360. 1*  
*Inst. 16. a F. N. B. 31 a.*

Collation being by right or wrong, gains  
 no Patronage, doing it in the Patrons  
 Right, *Hob. 154. Co, 6. rep. 29. Green's Case*  
 and 50 *Boswell's Case. 1 Leon. 226. Mo.*  
*pl. 222. Hob. 124 b, 122.*

A Church being void, the King within a  
 Month, reciting *ad nostram presentationem spe-*  
*ctam' jure prerogativa*, presents one who is  
 admitted, &c. and dies; the King presents  
 again; the true Patron brings a *Quare Im-*  
*pedit*. Resolved the King's Presentation is  
 void; as 'tis in *Green's Case, Co. 6 rep.* where  
 the King presents, as by Writ of his own  
 Title, where he had Right of Lapse, and the  
 Patron had not only Right of *Quare Impe-*  
*dit*; but might have presented upon him at  
 any time; and by the Bishop's receiving his  
 Clerk, the other is *ipso facto* out: For it was  
 but as an undue Collation of the Bishop,  
 and no U'urpation in the King, *Hob, 301.*  
*Grandy vers' Epm' Cant. Dy. 327.*

One had a Grant of Outlaws Goods in  
 the Rape of *Bramber*, and that had a Grant  
 of the next Avoidance of the Church with-  
 in the Rape, was Outlawed, and the Church  
 became void, the Grantee shall have it: For  
 it hath such a Locallity within the Rape, that  
 the Lord of the Liberty shall have it where-  
 soever

soever the Grantee of the Voidance, or his Deed is, which the other needs not shew, coming in the *Post. Hob. 132 Hollam against Shelley.*

Before the Statute 25 E. 3. The Incumbent or Ordinary could not counterplead the Plaintiffs Title; yet if the *Quare Impedit* were brought against the Incumbent and Ordinary, the Incumbent must plead in Abatement, that the Patron is alive, not named, &c. *Hob. 316. Ellis against Bishop of York.*

No Incumbent is enabled to counterplead by 25 E. 3. 27. till he be possessed, that is, till he be inducted; and if he resign, he could not counterplead; for that was given to maintain his possession, which by the Resignation is gone, *Hob. 319, 193. Dyer 1. b. 293. a. H. 2 H. 7. pl. 15.*

If any one of the several pleas of the several Defendants in a *Quare Impedit* against a Patron, he shall be barr'd against all; therefore name no more Defendants than necessary: No, not the Ordinary, if the Church be once filled, *Quare Impedit* against two, the Incumbent sets up one Title, the Patron another: Neither Estops the other; and because it appears not which is true, both are to be admitted, *Hob. 320. Co. Ent. 491, 492. pl. 10.*

In making Title in *Quare Impedit*, lay the presentation of the last Incumbent, and name him; yet 'tis not material whether the Clerk were the same that is named, so it be of the same Patron, *Hob. 321.*

Lord of a Mannor, whereto an *Advowson* is Appendant, grants the three next Avoidances, and usurps upon the Grantee; at the first, this puts the Grantee out of possession of all the three Avoidances; and he has the whole *Advowson* again Appendant to the Mannor; so that being Attainted, and the King grants the Mannor, *adeo plene*, as the Grantor, *viz.* the Parson attainted *habuit*, it passes the Mannor with the intire *Advowson* Appendant, and not as the three Avoidances were in *Gross*, and the rest of the *Advowsons* Appendant to the Mannor; for then that in *Gross* would not pass for the King's Grant, *Hob. 321, 202, 323. Elves against Bishop of York.*

Process at Common Law, was Summons, Attachment and Distress infinite; but by *Marlbridge cap. 12.* if he came not at the Grand Distress, Judgment, and a Writ to the Bishop, although *Nichil* be returned on every Process. Distress against two, one makes Default, the Plaintiff shall have a Writ to the Bishop, by the Common Law; but if the Defendant appear at the Distress, and make Default afterwards, no Judgment;  
but

but a new distress must be. 2 *Inst.* 124, 125.  
F. N. B. 39.

The common Essoyne, *de malo veniendi*, is allowed in *Quare Impedit*, not *de servitio Regis*, &c. 2 *Inst.* 125.

None ought to present the King's or any Judge's Clerk to a Livery in Controversie, on pain that the Clerk shall lose the Church and his Service to it, for a year. 2 *Inst.* 212.

It was ordained at the Council of *Lyons*, that Lapse be given against a Patron after six Months; but this bound not the King nor Subject, till it was here allowed; and in many Cases, it's restrained by Act of Parliament; as in some to give notice, &c. As it's said, it was by the Council of *Lateran*. 2 *Inst.* 273. 368.

In *Aff. de Darrain presentment*, or a Writ of Right of *Advowson*, none can have Title without alledging Seisin in himself; but in a *Quare Impedit* one may have Title of the Seisin of him by whom he claims, and in a Writ of Right, he may declare of his Ancestors Seisin; but a Purchaser can only have it of his own: and before *Westm'* the second, if Tenant in Tail or for Life, had suffered an Usurpation, they had been without Remedy. 2 *Inst.* 356. 358.

If the Heir within Age be in Ward, he shall not have a *Quare Impedit* till he come of Age; but if out of Ward, he shall immediately



diately have such *Quare Impedit*, as the Ancestors by Possession might have had, though the Ancestor actually had it not. 2 *Inst.* 359.

Plenary hanging, the Writ was no Plea, but Plenary before the Writ brought, was a good plea in *Quare Impedit* at Common Law; but by *West.* 2. 5. 'tis none, unless it be by the space of six Months, before the Writ brought. 1 *Inst.* 360.

No Plenary is barr to the King, whether he presents in his own Right, or in a Subjects, but 'tis in case of the Queen, though she claims by the King's Endowment. *Vide* 43 E. 3. 14. 47 E. 3. 4. 21. 8 E. 3. 38. b. 1 E. 3. 3. 15. Co. 1 *Inst.* 119. b. 344. a. 'Tis said, no Plenary is against the King till Induction, that it seems a hindring from presenting, but Induction is no barr of his *Quare Impedit*. 2 *Inst.* 361.

When several persons claiming an undivided Interest in the *Advowson*, agreed by fine &c. to present by Turns, if one usurps the other's Turn, he is not put to a *Quare Impedit*, but shall have a *Scir' Fac'* out of the fine, and therein a Plenary by six Months, is no barr. 2 *Inst.* 362. F. N. B. 34. I. Dy. 259.

If upon the Foundation of a Chantry, the Composition be, that the Lapse shall incur within a Month, if upon a Disturbance, the  
Lapse

Lapse be suffered, he shall recover Damages within the Equity of *Westm'* 2. though it says, *per tempus semestre*, and yet here 'tis but one Month. 2 *Inst.* 362.

The two years Damages or Imprisonment are given whereby the party loses his presentation by the Disturbance, or might lose it by the six Months passing; but if the Church remain void after the six Months, so as he may have his Turn, he may pray a Writ to the Bishop, and take's half years damage for two years, and loses his Turn. 2 *Inst.* 363.

*Westm'* 2. Cap. 5. gives the *Quare Impedit de Prebendis, Capellis, Vicariis, Hospital' &c.* yet *de Capella* a Writ was before. 2 *Inst.* 363.

If one Parcener usurp the Turn of the other, it puts not the other out of possession, but he should have his Turn when it happens; and this extends to their Assigns; so if one Joynt-tenant presents alone, it puts not his Companion out of possession. *Ib.* 365. 1 *Inst.* 186. b. Tr. 1. 243. a.

In a *Quare impedit*, the Ordinary must shew the Cause of Refusal, specially and directly, that the Court by Advice of Learned men may judge whether sufficient Causes of refusal may be in respect of the person, as Bastardy, Villany, Outlawry, Excommenement, Laity, under Age, &c. in respect of Inability, as unlearned &c. and if the Refusal

sal before Ecclesiastical Causes, as Heresie, Schism, Want of Learning, &c. he must give notice to the Patron; if Temporal, as Felony, Homicide, or other temporal Crimes, or the Party be disabled by Statute, or Temporal Law, notice need not be, unless so provided by the Statutes; and the Ordinaries Refusal concludes not the party, but he may deny it, and then the Court shall be certified by the Metropolitan; or if temporal, it may be traversed, and tryed by Issue; and if the party refused, be dead, it shall be tryed *per Patriam*, least there should be a Failure of Justice, because the King cannot examine him. 2 *Inst.* 632. 5. *rep. Speccor's Case*, Dy. 254. b. 291. b. 6. *rep. Green's Case* 4 *rep. Holland's Case*, Dy. 327. 328. 58. Tel. 7.

If an Alien be presented to a Living, the Bishop ought not to admit, but may lawfully refuse him. 4 *Inst.* 438.

One that has Judgment to recover in *Quare Impedit*, is sued to be outlawed; *Quare* how the King shall have it? Whether the King shall have it either by *Scir. Fac'* against the Plaintiff or Incumbent, that is presented by Lapse. *Beverly* against Arch-bishop of Canterbury, Ow. 53. Dy. 26. a. 129. 130. 269. a. 283.

A Mannor whereto *Advowson* is appendant, the Church is void; a Grant of the Man-

Manner which the *Advowson* passes, not the Avoidance, neither in the King, nor in the case of a common Person, for 'tis a Chattel vested. *Dy. 300. a.*

Next Avoidance is granted to *A.* and *B.* and becomes void, and then *B.* releases to *A. totum Jus*, &c. and *A.* being disturbed, brings a *Quare Impedit* in his own Name, for by the Release *Nichil operatur* therefore his Companion shall joyn with him. *Ow. 65. 32. 1 And. pl. 241.*

*Quare Impedit*, it lyes of a disturbance of a Presentation and Nomination to an Archdeaconry. *Ow. 99. Sale against Epm' Litchfield.*

Several have an *Advowson* to present by Turns, and one presents, &c. if his Clerk be deprived; yet it shall go for his Turn, unless the presentations, &c. were all void; as 'tis for not reading the Act; or as in *Windsor's Case*, where one prosecuted upon the Deprivation of another, and the Deprivation taken off, and the Parson restored by future Sentence; and the *Advowson* is granted over after the Church void by Deprivation, *quod non est lex*: For one Grantee cannot release to his Companion, *Co. Inst. 276. b. Ow. 131. Lees vers' Epm' Coventry, 5 rep. Windsor's Case.*

Affize of *D. Darrein* presentment against several; one makes Default, if they do not plead

plead in Abatement: The Assize shall not be awarded, because it cannot be taken by parcels; therefore a Re-summons shall be awarded against him that makes Default, and the like to the Jury, *Hutt. 3.*

By an Usurpation upon a Grantee, or Lessee for Years, the true Patron is out of Possession, and the Usurper in possession of the whole Fee; so that against him, the Writ of Right lies, but by *Westm' 25*, he in Reversion may have a *Quare Impedit* when the Church is void, and re-continue it, *Hutt. 66. Hob. 240, 322. 1 Inst. 249. a.*

The King, having no Right, presents one by Lapse; the Church is not void as to Spiritual matters (to wit) to have Tithes, &c. for to that purpose he is Incumbent; but as to hinder the true Patron of his Presentment, he is not; but the Church void, *Hutt. 66. Hob. 302.*

He that recovers in a *Quare Impedit* presents his Clerk, and has him admitted without any Writ to the Bishop, 'tis as good as if he had; like one that entered after Judgment without *habere facias possessionem*, *Hutt. 66.*

The King presents, having no Title, the Patron gives another a presentation, and then recovered against the King's Presentee; then the presentation was exhibited to the Bishop, Issue being, if the Church were void when the Patron presented; held it was: For he pre-

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sented

sented when the presentation was exhibited; and that was after the Judgment: and so it had been, if it had been exhibited before the Bishop. Then the Patron recovers, and then exhibited to the Bishop again, 'tis a good Presentation: For the Patron could not revoke, or give a new presentation; for he had passed over his Title by that, *Hutt. 66.*

In a *Quare Impedit*, the Plaintiff made his Title from the Colledge of, &c. and was seized, and presented; and that after the Plaintiff's Ancestor was seized and presented, and that he was attainted of Treason, and the Colledge usurped on the King; and that afterwards the Attainder was reversed, and the Church became void; and so it belonged to him to present: And the Defendant demurred, and had Judgment without making any Title, *Dy. 24. b.*

The Church being void, the Patron grants *proximam presentationem, &c.* the next Avoidance passes not, being a thing in Action; but the Grantee shall have the next after, 2 *Cro. 91.* if the Church voids by the Incumbents taking a Bishoprick or Plurality; the Grantee must take that Avoidance, and cannot have the next, *Dy. 264. 31. Ow. 131. 53. Dy. 121, 130, 282, 283, 269. a. 1 And, pl. 32.*

If Co-parceners agree to present by turns, the Composition is exempted by presentment,  
by

by every one in their Turn; and in *Quare Impedit* afterwards brought, he need not mention the Composition, because exempted, Dy. 29. a. F. N. B. 33. l.

One seised of an *Advowson*, grants *proximam Advocationem* to one, and then granted *proximam Advocationem* to another; *Fitzherbert* held the second Grant void, because he cannot have the next Avoidance; and so is the second part of *Croke* 691. *Shelley's Case*; and that if one grants a third Avoidance, and the Woman recovers that in Dower, the Grantee shall have the fourth, Co. 1. *Inst.* agrees with three *Cro.* grantee of *proximam Advocationem*, cannot have the second, where one is granted before. Dy. 35. a. b. 1 *Inst.* 378. b. 379. a. 3. *Cro.* 790. 791.

One had the Nomination of a Church to an Abbot, and the Abbot to present, the Church being in the King's hands, he presented without nominating; the Party may have a *Quare Impedit* against the Incumbent, without naming the King, for it lies not against the King; and he that had the Nomination, had the Patronage, *Vide Mo. pl.* 147. *Vide* 14. H. 4. 11. He that has the Nomination, brings the Writ, *Quod permittat nominari*, the Writ abated for it should have been *nominare*, 1 H. 5. 1. b. Dy. 48. a. 1 *Cro.* *Daviston* against *Tates*, F. N. B. 33. b. 14 H. 4. 11.

Two Parceners, the younger in Ward, the Guardian marries the eldest, and presents in both their Names, the Church voids again, and whether the elder Sister shall present as in her Turn for the younger, *quare*. Dy. 55. a.

The Jury finds the Church full, of a Stranger presented by one not party to the Writ, and that *ex officio*, yet good. Dy. 77. a. Co. 6. rep. 52. a.

In *Quare Impedit*, one made Title to a fourth part of the Church in Grosle, and that he presented, and shewed, that others were seised of the other three parts, as appendant to certain Mannors, and they presented; and their Clerk dyed, and so it belongs to him to present. Dy. 78. b.

*Quare Impedit* by the King, the Bishop makes Title to a Stranger, and he permitted a Lapse, then the ordinary presented; the Clerk pleads, that he is Parson Imparsoned of the Presentment *in causa & forma preallegata*. It seems, that the Plea by the Bishop, that he presented, &c. is good enough, though indeed he collated, but the Clerk's Plea is, *per totam Curiam*, uncertain and void; for *in causa preallegata* cannot refer to any thing in his own Plea, because nothing alledged, and to the Ordinary *in* cannot, because to the Ordinary he is a Stranger, not a Servant.



vant: p. 14. H. 7. Pl. 4. Tr. 15. H. 7. Pl. 12.

*Quare Impedit*, by a Corporation the Defendant pleads, that they are incorporated by another name, and demands Judgment; so where the Plaintiff goes but to the Right, by *Fitzberbert*, 'tis ill *sans doubt*. p. 26. H. 8. Pl. 3. a.

In *Quare Impedit* he counts of an Avoidance by Deprivation, and shews not how it became void, or for what cause; and that assigned for Error; for it might be for Simony, or some such Cause, that gives a Title to the King, *sed non alloc'* and Judgment was affirmed. *Episcopus Glouc'* against *Veake*. 3 Cro. 678.

*Quare Impedit*, the Bishop claims nothing but as Ordinary, the Writ good, if a Writ against him immediate, *quare* the Plaintiff says, he presented *A.* whom he refused, he says he presented to the Church, because *litig'* if a Departure seemle, 'tis, for he intended to have pleaded it at first. Tr. 5. H. 7. Pl. 3.

In a *Quare Impedit*, the Plaintiff claims by a grant of a next Avoidance by *A.* the Defendant says, that *A.* was Tenant in Tail, held of *D.* by Knights Service, and describes the manner whereto, &c. and then usurped upon the Description, and dyed; his Héir

within Age, and the Lord granted the Ward to him, adjudged the Plea not double, tho the Usurper had Writ Remitter which was one thing; and though the Grantee of the Ward should have the first present against the Grantor of the next Avoidance, which is no more than a Lease for years, which the Guardian shall avoid for his time, and he have it after the Ward comes of Age, for, with pleading both, he could not shew his Title. *Tr. 5. H. 7. pl. 3.*

*Quare impedit*, and makes Title as appendant, and that *A.* as Ancestor presents *B.* &c. the Defendant protests, 'tis not appendant; says that he presented *D.* &c. The Plaintiff says, that at the time he presented *D.* it was in Lease to *E.*; the Defendant rejoyns, that before the Lease, his Ancestor presented *I.* 'tis a Departure, for he might at first have laid the Presentment in *I.* *p. 10. H. 7. pl. 6. Tr. 11. H. 7. pl. 15. p. 27. H. 8. pl. 11.*

*Quare Impedit* for the King, the Defendant pleads the Statute 25 E. 3. 1. That the King shall not present to any, living in *Auter droit*, but such as fall in his own time; and if he do, the Court is not to hold plea, Judgment *Si Curia cognoscere vult, per Thurning*: This is a plea to the Action, not merely to the Jurisdiction: For pleas for the Jurisdiction of one Court, give Jurisdiction to another,

ther, which this does not, 11 H. 4. 8. a.

*Quare Impedit*, and Counts of an *Advowson* appendant, and makes Title to a Gift in Tayl, the Defendant pleads, the Donee in Tayl was seized of it in Gross, and granted *per Curiam illam*, admit it once Appendant, and not shew how it after came to be in Gross, 44 E. 3. 15. b.

*Quare Impedit*, to present to a Church in *Somersetshire*, the Defendant pleads, that the Land whereto the Plaintiff supposed it to be reputed, parcel of the Mannor of S. in *Devonshire*; Issue of both Counties tryed it, Bend' 26.

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*Release.*

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*Release.*

**I**F Money be due upon Recognizance, and the Counfor pay part, and the Counsee give him a Release ; if the Release mentions not the Recognizance, it shall release so much as paid only : For the Recognizance is entire, and being destroyed in part, is destroyed in the whole.

If a man be bound to pay an 100*l.* to another, on such a day, and he tender the same at the day, he is not bound to pay the same on any other day, unless the Obligee will give him an Acquittance or Release.

*Replevin.*

**I**N a *Replevin*, the Defendant avoyed to distrein for Rent ; Charge granted in Tayl, the Plaintiff says, that an Ancestor of the Defendant, whose Heir he is, was seized of the Lands, discharged of the Rent, and gave to him with Warranty : No *Assets* descended ; adjudged an illegal plea ; First, because he pleads Warranty from an Ancestor, and shewed not what, whether lineal or collateral :  
Nor

Nor, Secondly, because he pleads, that he was seized of the Lands, discharged of, &c. and shewed not how, *viz.* by Union or otherwise, *H. 21 H. 7. pl. 11.*

*Replevin* avows Damage feasant barr, that the place where his Acre called *A.* whereof he is seized of 100*l.* and has Common in the Residue; after Verdict moved, the Blank in the Declaration makes all uncertain, *quid resid' est sed non alloc'*; 'tis found there is a Residue; and be it what it will, he is to have Common: And here no Land is to be recovered so, certain enough. *Sir Anthony Cope against Temple, Tel. 146, 147.*

*Replevin*, the Defendant avows, Forty shillings Rent for two Acres held of him; the Plaintiff replies, that he holds them and twenty more of him by 12 *s. absque hoc*; that he holds the two last by Twenty shillings; and though objected, the plea double, traversing that the quantity of the Rent: And also, that he holds the two Acres, only adjudged good, because otherwise he could not avoid the false Avowry, *M. 8. H. 7. pl. 1.*

*Replevin* and Avowry, for that *A.* was seized *in Jure Ecclesiæ*, and leased; good, without saying, that he was Parson, supplied by *in Jure Ecclesiæ*, but not in *Quare Impedit* the Plaintiff, 'that so he is a Parson Imparson', because till then, in that cause, he cannot plead in Bar. *Rolls against Walters, Noy. 70.*

If

If Cattel or Goods be distrained for Rent, or otherwise for Damages, then the party, whose Goods are so distrained, may make *Replevin*, and must prosecute his *Replevin*, as Plaintiff, and the Defendant must avow the taking; but if by chance the Plaintiff in *Replevin* become *Non-suit*, or Judgment against him, then shall the Defendant have a *Retorn' bend' averiorum*, upon which the Plaintiff in *Replevin*, may bring his Writ of *Second Deliverance*; but if he become *Non-suit* again, or Judgment against him, then the Defendant shall have *Retorn' bend'*, irrep-ledgeable, and keep the Goods for ever.

If Live Cattel, and Dead Things be Replevied by one Writ, as they may; the Live Beasts or Cattel, must be named before the Dead; as thus, *Quendam Equum suum & Catella sua que B. cepit.*

If a Man distrain Beasts or Goods for his Rent, and the Tenants tenders Amends before the Distress is taken: The taking the Distress, is *tortious*, *Mesme le Ley pur Damage fesant*. But tender after the Distress be taken, and before the Impounding, the Detainer, and not the taking, is *tortious*: But tender after the impounding, neither the taking nor detaining are *tortious*; for the Tender comes too late.

In *Replevin*, the Plaintiff is *Non-suited*, and the Defendant had a Writ of *Retorn' habend'*

*hond'* and enquiry *de dampnis*, the Plaintiff brings *Second Deliverance*: This is a *Superseas* to the *Retorn' hond'*, but not to the Enquiry.

By the Common Law, when the Goods or Chattels of any person are taken, he may have a Writ out of the *Chancery*, commanding the Sheriff to make *Replevin* of them; and this Writ is *Viscontiel*, and in the nature of a *Justicies*, in which the Sheriff may hold plea to any Value, and in all Cases; but when the Defendant claims Property, and when more than one Live Beast is taken, then the Form of the Writ, is *quod replegiari faceret J. S. averia sua*; and when only one Beast is taken, then the Form is *quod replegiari faceret J. S. quendam Juvenum suum, vel bovem suum &c.* And when many Dead Chattels are taken, then the Writ shall be *quod replegiari faceret Bona & Catella sua*, and the Plaintiff must ascertain them in the Declaration; But if but one Dead Chattel be taken, then the Writ shall be, *quod replegiari, facias J. S. quoddam Planstrum cum furnitura, &c.*

By the Statute of *Marlbridge*, cap. 21. the Sheriff upon Plaint made to him in Court, or out of Court, ought to make *Replevin* of the Goods or Chattels taken.

In *Replevin*, the Sheriff ought to take two sorts of Pledges; by the Common Law, Pledges *de prosequendo*, and by the Statute, Pledges

Pledges *de Retorn' habend'*, Co. Com' 145. b.

A Man who hath but only a special Property, may bring a *Replevin*, as when Goods are pledg'd to him, or Beasts are taken by him to compost his Land; and the Writ may be General or Special, 41 E. 3. 18. b. 22 H. 7. 14 b. 11 H. 4. 17.

If this Plea be before the Sheriff by Writ, then it may be removed into the Kings Bench or Common Pleas, by *pone*, by the Plaintiff, without Cause, and by the Defendant, with Cause mentioned in the Writ: But if it be before the Sheriff by plaint, then it may be removed by *Recordare*, issuing out of *Chancery* by the Plaintiff, without shewing cause, and by the Defendant, if he do shew cause in the said Writ.

A *Replevin* lies of such things whereof a man hath but a qualified Property, as of things that are *feræ naturæ*, and are made tame, so long as they have *Animum reverendi*: *le Case de Swans in Co. 7. rep.*

So *Replevin* lies of a Leveret or of a Ferret, 2 E. 2. *Fitz. tit. Avowry* 182.

Also *Quare cepit quoddam examen Apium, &c. Register Original. fol. 81.*

In many cases, this Action or Trespass lies at the Election of the Plaintiff; but against the Lord, Trespass lies not, 7 H. 4. 28. b. 6 H. 7. 9.

A *Replevin* lies against one, *de Averiis capt'*  
per



per ipsum simul cum alio, Co. Ent. 600. 2 Inst. 533.

So it lies *de averiis capt' & detent' quousq; &c.*  
*& de aliis averiis capt' & adhuc detent'*, Rast.  
 Entr. 567. 572. And in this Case, when the  
 Plaintiff declares, that the Defendant yet de-  
 tains the Cattel, and the Defendant appears,  
 and makes Default, the Plaintiff shall recover  
 all in Damages, F. N. B. 69. b. Co. Ent. 610.

When the Beasts are chased into another  
 County after they are taken, the party may  
 have a *Replevin* in which of the Counties he  
 pleaseth, or in both, *Idem* 65. 6.

When the Cattel of several men are taken,  
 they shall not joyn in *Replevin*; nor is it a  
 Plea to say, that the property is to the Plain-  
 tiff and another, Co. Com. 145 b.

In *Replevin*, the Plaintiff ought to alledge  
 a place certain, where the Cattel, &c. were  
 taken.

When the Plaintiff is *Non-suited* before  
 Declaration, and he sues *Second Deliverance*,  
 and is *Non-suited* also again before Declara-  
 tion, the Defendant shall have the Cattel  
 irreplegiabie without any *Avowry*, &c.  
 Dyer 280.

Scire

## Scire Facias.

**S***Scire Facias*, by the King to repeal a Patent, the Defendant pleads a Plea, whereon the Attorney General demurs, the Defendant joyns in Demurrer, and pleads over part of a Statute, and *Informand' Curiam. Co. 8. rep. 12. b.*

*Scire Facias* against an Administrator, who pleads a special *Plene administravit: Replic' quod devastavit*, and says not who *devastavit*, issue *quod predictus J. S. non devastavit*, found for the Defendant: the Plaintiff moved in Arrest, &c. 'tis not said who *devastavit*, so might be the Executor at Age, but *per non-nullos*, the Plaintiff shall, not after Issue, find a Fault in his own Replication. *Oxford against Rivet*, and 1 *Cro. 135.* Plaintiff after Verdict, when no Advantage of his own ill Declaration. 1 *Cro. 56. 66. vide Co. 7. Rep. 4. 6. 5. rep. 39. b. 8. rep. 59. a. 1 Cr. 39.*

*Scire Facias* of a Recognizance entred by A. and B. returned Terre-tenants, come in and plead, that C. hath three Acres of A. Land not summoned, &c. whereof he was seized

seized in Fee Issue, that *A.* was not seized of three Acres, Verdict find that he and *E.* were joyntly seized and infeoffed *C.* per *Papham* and *Gaudy*, 'tis against the Defendant; for now though the moyety of these Lands are subject to the Extent, yet upon the special Plea, which is false, for *A.* was not seized alone of them in Fee, as the Plea alledges, he cannot abate the Writ. *Fenner con' Dame Needam* against *Buning*. *Vide 3 Cro. 524. 52.*

*Scire facias* against two, for Damages recovered in Assize, by three; one Defendant pleads, that one of the Plaintiffs, supposed by the Plaintiff to be dead, at the time of the *Scire Facias*, was alive; and the other pleaded, that one of the Plaintiffs now supposed alive, is dead: ill, for they must joyn in Dilatories, though objected, they might have severed in their Pleas to the first. *Vide p. 26 H. 8. pl. 7.* One imparls, the other demands the view in a *Precipe quod reddat*, *quare* of that. *M. 7. H. 7. pl. 8. m. 10. H. 7. pl. 6. m. 12. H. 7. fo. 3.*

*Scire Facias*, to have Restitution of Money, or Reversal of Judgment; the Defendant pleads Payment, not good against a Record, without matter of Record, or specialty; and 'twas long before it was agreed, that levied by the Sheriff in a *Scire Facias*,  
was

was a good Plea, but at last agreed, because grounded on the *Scire Facias*, which he cannot withstand, *Urse* against *Harrison*; *sed vide* 2 *Cro.* 29. *Oguel* against *Randal*. *Per Popham*, bare payment without Writing, is no Plea to barr an Execution by *Fieri Facias* of *Scire Facias*, *vide* *H.* 4. 58. 59. In Debt on a Judgment leavyed *Fieri Facias*, and paid to the Plaintiff no Plea, because the Sheriff is to bring the Money into Court, not to deliver it to the Plaintiff, other if the Lands were extended by *Elegit*, 1 *Cro.* 239.

*Scire Facias*, as Cousin and Heir to *D. viz. Fitz A. &c.* Plea that I had no such Son, good, and he needs not shew who was the Plaintiff's Mother, as if it had been pleaded, the Plaintiff was not the Son of *A.* for then, the Birth of *A.* was confessed, he must, when he takes one Mother from him, give him another; but here the Birth of the Plaintiff is not at all mentioned, admitted, or granted. *Vide talem* 11 *H.* 456. b. 74. 75. *H.* 4. 38. 9. *E.* 3. 30. 31. Plea that he had no such Son, not admitted, but he for to plead whose Son he was. 8 *H.* 4. 21. a. 9 *E.* 3. 30, 31.

*Scire Facias* on a Recovery against the Heir and Terre-tenants, the Sheriff an Heir and four more Terre-tenants the Heir, *Nil dicit*; the other four plead, that two

two of them are Joynt-Tenants of part with J. S. not named, and resolved that the Joynt-tenancy is a good Plea in this Action, but not for all, but for that part wherein the Joynt-tenancy is: but because all joyned, where but two were Joynt-tenants, the Plea was ill for all four. *Holland against Dowitree*, &c. 3 Cro. 739.

*Scire Facias* on a Recognizance. Defendant pleads an Acquittance, Plaintiff replies, 'tis razed in such and such material places, and demands Judgment of the Writ, *per Curiam*; this being but a matter tryable by the Court, is but a Plea in Abatement, whereon a respond' Ouster shall be, and lies not peremptory, & *sic de Margine dict.* in all. In all our Books, Matters tryable by the Court, go only in Abatement, and are not peremptory, which seems, must be intended either of matters of Fact, or with some restraint; for, every Plea in Law, is tryable by the Court, 5 E. 3. 32 b.

*Scire Facias* on a Judgment against an Executor, he pleads a Judgment to J. S. of 100 l. another to himself of 100 l. and that he has but 100 l. to satisfy J. S. and says not *ultra*, to satisfy himself, ill; for he may pay himself, if he have not *ultra* to pay J. S. and himself, he is not bound to pay the Plaintiff, *Feltham* against Ex-  
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ecu-

ecutors of *Tourston*, Tr. 8. Car. 2. in *Scaccario*.

In *Scire Facias*, on a Recognizance for the Plaintiff, 'tis sufficient to assign breach, that he beat one, *contra Pacem*, without saying *vi & armis*, *aliter* in Battery. *Hutchins* against *Perryman*. M. 14. Jac. B. R. 3. *Bulstr* 220.

In *Scire Facias* of a Judgment against an Executor, he pleads, *Plene administravit*, *Jour de brief*, ill; for he might have paid Bonds before, so should he have pleaded, *Riens tempore mortis nec unquam postea*; but the Plaintiff taking Issue, waved the benefit of the ill Plea, *Harcourt* against *Wrenham* Mo. pl. 11. 78.

Sheriff, Bailiff, &c.

**A** *Lattitat* was delivered to the Under-Sheriff, to be executed, the Defendant being in Company with the Under-Sheriff; and the Under-Sheriff lets the Defendant go, and returns, *non est invent'*: Whereupon, the Plaintiff brings his Action of the Case, against the Under-Sheriff, setting forth the whole Fraud and Falseness of the Under-Sheriff, and Judgment by default. But upon Motion in Court, in Arrest of Judgment, the Action did not lye; for the Sheriff, is the person alone to answer in Court for all Misdemean-

demeanors of the Under-Sheriff and Bailiffs.

Upon a *Fieri Facias*, if the Sheriff return, that he hath levied the Money, and do not pay it to the Plaintiff at the Return of the Writ, the Plaintiff may have a *Scire Facias* against the Sheriff, to shew cause, wherefore the Sum levied, should not be levied of the Goods of the Sheriff.

The Sheriff cannot break open any man's House or Close, upon a *Fieri Facias* executing, ( and much less the Landlord shall not break open doors to distrein for Rent ) but where the King is concern'd ( as upon an Ut-lary ) there the Sheriff may justify the breaking open the doors, if he be resisted; but he must acquaint them in the House with the Cause of his coming, before he force them open.

If a man be in the hands of the Under-Sheriff, in Execution for Debt, and the Debtee tell the Sheriff, that the Prisoner hath satisfied him, if the Sheriff release not the Prisoner, it is false Imprisonment.

A Bailiff having a Warrant to attach the Goods of a Person, to answer at the County Court, doth attach the Goods accordingly, and after delivers them to the Defendant, and takes Bond of him, to appear at the day, or redeliver the Goods to the

Bailiff, this is not within the Statute of 23 H. 6.

A Bailiff of a Liberty cannot execute a *Capias Utlegatum*, and if the party be in the hands of the Bailiff, the Sheriff may take him, for it is a *Non Omittas* in it self. *Per Curiam. Hill. 13. Ja. in C. B.*

*Observations upon the Statute of 29 Car. 2. Regis, for prevention of Frauds and Perjuries.*

1. **B**Y this Act it appears, That if a Feoffment be made, and Livery and Seisin duly executed, although it were before many credible Witnesses (as formerly the Law was) yet unless it be put into Writing, nothing shall pass thereby, but an Estate at Will: and in like manner, all leases made by word for any longer time than three years, or other Estates made or created without Writing, are subject to the same Rule, (that is) shall be only Estate at Will, that are so made by Words, without Writing, after the 24th. of June, 1677.

2. After the said 24th. of June, 1677. No Executor or Administrator, shall be charged with any special Promise, to answer Damages out of their own Estates, but only in Relation to the Testator having Assets in their



their hands, and that no other person shall be charged with any special promise, to pay the Debt of another man, or answer for the Default of any other, or upon any Agreement of Marriage, or for any Agreement for Lands, or for any other commodity or thing not to be performed within one Year after the making of any such Agreement, unless the same Promise, Bargain or Agreement, be set down in Writing, and signed by the party to be charged therewith, or by some other person, lawfully authorised by him, so to do.

3. All Wills and Bequests of Lands, Tenements, &c. after the said 24<sup>th</sup>. day of June, 1677. shall be put into writing, and subscribed by the Testator, or some person else in his Presence and by his express Directions, and attested and subscribed in the presence of three or four Witnesses; other wise, all such Gifts to be void: all such Devises so made and subscribed by the Testator or his Directions, as aforesaid, shall be good, and stand effectual in the Law, unless the Testator shall, at any time, cancell the Will, or alter it by a subsequent Will.

4. All Trusts shall be in Writing, and signed by the Party, declaring the Trust, else to be void, except such Trusts as arise by Implication of Law, and Lands in Trust

for the use of others ; shall be chargeable with the Judgment, and lyable to the Execution sued out against *Cestuique use*.

5. Aman seized of one Estate *pur autre vie*, may devise the same by Will, in manner aforesaid, and no such devise shall descend to the Heir, that so died seized, as Lands in Fee-simple should do, and such Heir shall be chargeable therewith, as a special Occupant; and in case of no such special Occupancy, then shall the Land descend to the Executors and Administrators.

6. From and after the said day, every Judgment shall be signed with the day of the Month, and the Year in which such Judgment was Signed; and the day of the Month and Year are to be entred on the Margin of the Plea-Role, and they shall be accounted Judgments but from that day wherein they were so signed, and not from the first day of the Term, as formerly was used: the like Rule for Recognizances.

7. No Writ of *Fieri facias*, or Writ of Execution, shall after the property of Goods, but from the day the Writ was delivered to the Sheriff, to execute, which day and year the Sheriff is to endorise on the back-side of the Writ.

8. No Bargain of Goods above the value of ten pounds, shall stand good, unless the  
Buy.

Buyer take part of the Goods (so sold) into his Possession, or give something in Earnest, or that some Note or Memorandum be made thereof in Writing.

9. No nuncupative Will whereby an Estate is bequeathed above the value of thirty pounds, shall be good, unless it shall be proved by three Witnesses at the least, nor unless the Testator did bid the parties present bear witness, that so was his Will, or to such like effect; nor unless such a Will was made in the time of the Testator's last Sickness, and in his place of Habitation; and unless he was surprised and taken sick from Home, and that no Testimony shall be received to prove such Will after six Months, unless the Testamentary Words were committed to Writing within six Days after the making of such Will.

10. No words unless they are committed to Writing and read to the Testator and allowed by him, and proved by three Witnesses to be his Will, shall alter any Will in Writing concerning any Goods or Chattels, or any Device or Bequest therein.

*Trespass,*

## Trespafs.

**I**F my Servant without my knowledge, puts Beasts into another mans Ground, the Servant is Trespasser, and not the Master.

If a man beat my Servant, I may have Trespafs, and my Servant another Action of Trespafs, *diversis respectibus*.

It is good to lay the Action some day after the Trespafs committed; yet it is not material or traversable if be laid before: For it's but a Circumstance: As Trespafs done the Fourth of *May*, the Plaintiff alledgeth the First of *May*, it's sufficient, if upon Evidence it be proved, that the Trespafs was done before the Action brought.

A Master is punishable for his Servant, if he be about his Masters Business: An Abbot for his Monk; a Captain for his Soldier; an Host for his Guest; So a Sheriff for his Under-Sheriff and Bayliffs: But a Master

Master shall not be Punished for Trespass of Battery, or Entry into Lands, or Felony, or Murder, or such like, done by the Servant, unless done by his Command.

If a Servant keeps his Master's Fire so negligent, that it burns his Master's and the Neighbours House, the Master is chargeable therewith.

A man is chargeable with the Faults of his Family or of his Beasts: If a Ship is perishing, and the Marriners cast the Goods, to save them, on the Land next adjoyning; yet this is Trespass, and punishable by him that holds the Land.

A Servant may justifie the beating of another in Defence of his Master.

A Man shall not have his Action of Trespass for Threatning, and recover Damage as well as in Assault and Battery.

The Law does not allow any man to strike in Revenge of Ill words; and the reason is, because there is no proportion between Words and Blows; but he that is struck may strike again.

In Trespass, he that consents and gives aid to the committing of Trespass is a Principal and no Accessary to the same Trespass.

If Tenant at Will commits voluntarily  
Waste,

Waste, Trespafs lies against him, notwithstanding his Possession; so that if I deliver my Sheep to another, to Fold or Dung his Land, or a Horse to Ride, or Oxen to Plow his Land; If the Bailiff spoil or kill them, I have an Action of Trespafs against him, notwithstanding the Delivery of them, or *Trover* at his Election.

If a Man disseize me of my Land, or dispossess me of my Goods, yet I may enter upon the Land, or take my Goods, although I release to the party Disseizer or Trespasser, all Actions; yet this Release shall not Bar my Right.

No Trespafs can be excused by Law; but it may be justified; as upon *son assault demesne*, or *prout ei bene licuit*; but not to say *per infortunium* & *contra voluntatem suam*; or *casualiter* or such like, is no good pleading to excuse a Trespafs or Wrong done.

One Train-Band Souldier in Skirmishing, hurteth another in Discharging his Musquet, who brings Trespafs, and the Defendant justifies and excuses himself, as being a Souldier upon his Duty; and upon a Demurrer, Judgment for the Plaintiff: for tho' the Law be, that if two men Tilt or Turney in the presence of the King, or two Masters of Defence, in playing a Prise, the

the one Kills the other, this shall be no Felony : So if a Lunatick Kill a Man, it's no Felony , because Felony must be done *Animo Felonice* : But yet in Trespafs, where Damages are to be recovered, according to Loss or Hurt it's not so : And therefore if a Lunatick hurt a Man, he shall be answerable , in Trespafs, wherein no man shall be excused , except it may be adjudged utterly without his Fault.

If there be a Lease of a House for Years, and the Lessor Enters , to see if Waste be committed , or want of Repairs ; and then he takes away some of the Lessee's Goods , against the Will of the Lessee , he shall be punished as a Trespasser *ab initio* : So of one that comes into a Tavern, and carries away a Cup ; for though the Entry were lawful, in both Cases at the First; yet if they do an evil Act after the Entry, it makes the Entry and all the rest unlawful: And the reason is, for that the Law gives liberty to enter for one intent, and he useth the same for another ill Intent. The same Law is where Goods are seized for Rent or Damage *feasant* and the Goods are abused.

A Man may Distrain in an House, if the Doors be open, otherwise not but a man may distrain *per Ostia & fenestras*; so that a Distress taken out of a Window is good.

You

You cannot present, in a Court *Leet*, any thing that is particular Trespafs, to particular persons, but only such things which are a Common Nufance to all; neither is such Offence punishable there; As if a Freeholder erect a Dove-house it is only Trespafs to those whose Corn they eat, and not punishable in the *Leet*.

Also every Man's Land is supposed to be Inclosed, though it lie in the open Field, and if Trespafs be done the writ is *quare Clausum fregit*.

If a Man doth a Lawful Act which proves unlawful, it is *Dampnum sine injuria*: As if in Plowing my own Land, the Cattel are so unruly, that they carry the Plow upon another's Land against my Will; this is a good Justification.

In all Trespases there must be a voluntary Act of the Trespasser, and a Damage to the other party, else the Trespafs lies not.

In Trespafs for Beating and Assaulting the Wife, the Husband shall have the Action alone, without mentioning the Wife, because whatever Damages are Recovered shall go to the Baron only.

In all Actions of Trespafs, *vi & armis*, &c. there ought to be an express Averment of the Force in the Declaration, and ought not  
to



to be expreffed with a , whereas there was fuch a Force.

In an Action of Trespafs againft one, with a *Simul cum*, againft others, if nothing be proved againft the other, they may be examined as Witneffes in the Caufe: And if recovery be had againft the Defendant, named in the Declaration, thofe in the *Simul cum* can never be fued afterwards for the fame Trespafs.

Trespafs againft three, they plead, that they had Common, and each put in his Cattel to ufe it; and the plea adjudged fingle and good enough: But in Trespafs againft one, and he pleads, that *A.* had Common, and to *B.* and *S. C.* and he as their Servant acct' in &c. 'twere confuted and ill; but if he pleads, that as a Servant to *A.* he put in fuch, and to *B.* fuch, &c. 'tis good enough: *vide Title* Joyntly and Severally, *Tr.* 15. *H.* 7. *pl.* 18.

In Trespafs, the Defendant pleads, that the Plaintiff delivered Goods to the Defendant, to carry to fuch a place: The Plaintiff replied, *de Injuria fua*, &c. *per nonnull'*; no plea: For where the Defendant claims under a Gift or Delivery of the Plaintiff, the Plaintiff muft answer to the Gift or Delivery by himfelf, and not the mean Conveyance, which *Bryan* granted; but held, that

that *de Injuria*, &c. was a good Traverse, that he delivered them, *M. 16. H. 7. pl. 2. M. 10. H. 7. pl. 15. H. 15. H. 7. pl. 6. Tr. 15. H. 7. pl. 19.*

Trespafs: the Defendant justifies for taking a Distress for an Amerciament as Bayliff of a Court Baron, good; though he shewed no Warrant in Writing, for the Precept may be *per parol*; but because he pleaded not that he returned the Precept, 'tis ill; as if the Sheriff returned not the *Cap*, he is a Trespasser, *Trin. 16 H. 7 El. 9. 15.*

Trespafs and Battery against a Constable, he pleads that the Plaintiff was beating another, and he came to keep the Peace, and laid Hands on the Plaintiff, and he beat him; and so justifies, *per Ryder Just.* 'tis double: For he justifies as Constable, and also in his own Defence. *Kingsmil contra*, the Beating had not been Lawful, but that he first beat the Constable, *P. 2 H. 7. pl. 5.*

*Trans' de domo fracto & muris ejusdem domi*, the Defendant pleads *Not Guilty* to the breaking of the House; and as to the Wall justified, ill: For the Wall is part of the House; so he cannot be *Not Guilty* of all, and justifie for part; for that is repugnant, *pl. 21 H. 7. pl. 7.*

Trespafs of a thing done at *D.* and after in plea, they alleadge another thing in pursuance

ance of the former to be done at *D.* and though they say not at *D.* yet intended so, and ruled well, *M. 21. H. 7. pl. 10.*

Trespafs for Digging, &c. the Defendant justifies as Commoner, to dig a Trench, to let out Water, wherewith it was usually surrounded, in the Winter, as well for the saving the Lands as the Commons; and by some this seems double; for either of them was a sufficient Justification of Issue: And where one pleads two things, either of which is a plea of it self, 'tis double, *Tr. 17. H. 8. pl. 1.*

He that pleads a Fine in Barr in Trespafs or in Warranty must conclude Judgment, *Si Acco'*, and not rely on the Estoppel; for that goes to the Realty, which is not in question in Trespafs, *Tr. 27. H. 8. pl. 19.*

Trespafs against *A.* for Imprisonment, &c. he pleads, that the Plaintiff had committed Felony, and he prays the Constable &c. and thereupon they went and arrested him; ill, because he answers nothing for himself; that he, by Command of the Constable, &c. *P. 2. E. 4. pl. 20.*

Trespafs: the Defendant pleads, that his Father was seized, and let to *A.* for Life, to enfeoffee; &c. And *A.* died, and his Father entred, as in his Reversion, and it descended to him, and objected; his plea double, on the

the entry of the Father, the dying seized and descent, by *Billing* and *Needham*, but *Littleton* and *Cook*, *contra*. M. 2. E. 4. pl. 15,

Trespafs by *A.* and *B.* for breaking their Close, the Defendant to *A.* pleads a Title in Barr, and to *B.* not guilty, by *Danby*, *Mayle*, *Cheke*, the plea ill, for the Barr goes to all, and the other makes it double, *Needham* and *Ashton contra*, each Plaintiff ought to have his Answer. M. 2. E. 4. pl. 20.

Trespafs for cutting Subboſc', and carrying away two Loads of Barley: *quoad* the Barley, the Defendant pleads a Lease at Will, by one Tenant, as Tenant in Common: and *quoad* the Wood a License by him, and the Plea not double, for a Tenant at Will cannot cut, &c. without License. M. 2. E. 4. pl. 25.

In a *Precipe*, the Tenant pleads a Release in Barr, and it was in Barr of all the Lands in S. that he bought of J. S. ill; not averring, that he bought the Lands of J. S. the words being general, *viz.* All the Lands, &c. not particular of *bl.* Acre, &c. which will be otherwise. M. 2. E. 4. pl. 26

Trespafs on the Stat. R. 2. the Defendant pleads a Guilt of the Land by Act of Parliament, whereby he was seized *temps'* H. 6. and

and the Plaintiff entred upon him *temps* E. 4. and he entred; *Choke Justice*, and *Littleton*, held it double, for the Gift and Seizin is one barr, and the Entry of the Plaintiff and the Re-entry of the Defendant is another; but *Ardern Justice*, and *Lason*, *contra*, for 'tis all pursuant, *Et ibidem* by *Choke* and *Needham*, *Justice*, when the Defendant pleads, that the Plaintiff entred so long after the Statute, and says not by what Colour it shall be intended more strongly against himself, and intended by Title, *Ardern*, *Justic' cont'*, no Title shall be intended, till the Plaintiff shews it. *Trin. 3. E. 4. pl. 1.*

Trespas for taking a bag of Money, the Defendant pleads, that the Plaintiff was indebted to him, and says not how, and delivered it him in payment; the Plaintiff replies, *De injuria*, &c. And *per Littleton*, no Plea where the Defendant justifies by an Act of the Plaintiff himself. *Vide Trin. 20. E. 4. pl. 1. m. 9. E. 4. pl. 25. 12 E. 4. 10. 6 H. 19. E. 4. pl. 15.*

Trespas against the Lord, *vi & armis*, he admits it, and pleads a Distr' for Services and the Issue of Views, Arrear, found for the Defendant, yet no Judgment; for the Court is not to admit him to recover against a Negative Statute, other, if it were affirmative, and Election to proceed either way. *p. 10. E. 4. pl. 10.*

T

Trespas

Trespas by J. S. for taking an Horfe, the Defendant pleads, that J. S. *de D.* was possessed, and gave him the Horfe, &c. the Plaintiff replies, that he is not the same person in the Barr and Dem', and tho objected this ill in matter of Fact and Dem' for matter in Law; and it cannot be tryed by Court and Jury, the Plea ruled good; for by joynning in Dem' 'tis confess'd, he is the same Person, and he might have taken Issue of it. *H. 13. E. 4. pl. 4.*

Trespas against three, they all plead Not Guilty, as to part, and *quoad resid.* plead a guift of the Goods, and Issue, and at *Ni. pr. 2.* make default; the third pleads a Concord, *Prims Darr' contin'* prayed to try the Issue against the two by Default, because no *contin'* can be made of it, because they absent, and if not tryed, now 'twill be discontinued. Objected, that goes but to part, and there is now a Plea, that goes to all, which is to be tryed first; for if that be against the Plaintiff, though he should have Verdict on the other, he can have no Judgment but for the Inconveniency, and for that this Plea to the whole, comes after the *ven' fa'*; and the other was before; therefore 'twas tryed; but if both had been before the *ven' fa'*, it could not have been, and they found for the Plaintiff, and they had Judgment with a *Cessat Executio*, till the other

other tried; for the *Concord* was laid in another County; so the Plaintiff released to him, and took Execution tho' the Judgment on the First Plea, *Tr. 15 E. 4. pl. 11, 3. vide 4 E. 3. 42.*

Trespafs, the Defendant justified for Tithes severed; the Plaintiff replies, *de son tort*; objected no plea, no more than when in Trespafs the Defendant makes Title, and pleads *son Franktenement*, or a Lease for years, by *Bryan*; and so it seems tho' *Piggot* says there, he claims there the Occupation of the Land; not so here, *P. 16 E. 4. pl. 9. 2 Cro. 224, 225.*

Trespafs Not Guilty, and Issue, the Defendant *puis darr' contin'*, pleads a Release, dated before the last *Contin'*; but delivered after; the Plaintiff replies, that was delivered the same day 'twas dated, Judgment against him; for he did confess, he did release; so satisfied, and no matter when; but he might have pleaded, that he did not deliver it *puis darr' Contin'*; or that it was not his Deed *puis' darr' contin'*, by 78 *H. 6.* and 39. *H. 6. 8, 9. Tr. 16 E. 4. pl. 2.*

Trespafs, the Defendant pleads, that the Plaintiff let to him for Years *per Cur'* he must shew what Estate he had, as that he was seized in Fee, &c. and let but by

*Kidwelly* : when one pleads a Lease from a Stranger, 'tis necessary to plead it so; not when he pleads the Lease to the Lessor himself, *M. 22 E. 4. pl. 217.*

Trespafs for Assault and Battery, and Threatning, &c. *de son Assault demesne* Obj. in Error, the plea ill, not answering the *minas*; but resolved well enough for the *minas*, laid but in aggravation of damages. *Penruddock* against *Errington*: *sed vide Hill. 16 E. 4. pl. 8. contra M. pl. 983.*

In Battery, the Defendant justifies by Warrant out of a *Leet*; and though they plead not the day of the *Leet*, nor that the House was within the Jurisdiction, nor the Warrant; yet all these being but Indictments, adjudged good. *Curey's Case, M. pl. 11. 47.*

Trespafs for entring the Close, and cutting so many Trees, *quoad* all but cutting the Trees, and entring the Close, pleads Not Guilty; *et quoad fract' Claus'* pleads, matter in Law, and justifies the cutting the Trees; but because in the *quoad*, &c. nothing was said of the Trees; the plea is ill, and was amended, and made *et quoad fract' claus'*, Cutting, &c. *Co. 4. rep. 62. a.*

Trespafs and Battery, the Defendant pleads, that he had a Lease for Years of an House, and the Defendant would have put



put him out, &c. good, without shewing by what Title his Lease or Commencement, &c. of it, because said but as Inducement: For whatever Title he had, his possession excused him. *Scable* against *Avery*, 1 *Cro.* 69.

In Trespass, *Quare clausum fregit in Dale*, the Defendant justifies in *Sale absque hoc*, that he is Guilty in *Dale*: It seemed to be an ill plea, amounting but to the General Issue; but *Fitz-herbert* doubts, because *Dale* and *Sale* may be adjoyning, and it may be doubtful in which the Close lies, *Dyer* 19. a.

In Trespass in several things in a Park, the Defendant made several Justifications, and pleaded, that *quidam* J. S. granted, &c. & *quidam* J. S. granted, &c. and so began every plea with *quidam* J. S. which shall be intended several men; and it all being about one Office, 'tis ill: for several men could not severally grant him it, 3 *Cro.* 401. *quidam* J. S. intended the same person that it was mentioned before: And so *Sti.* 329. and 18 *E.* 3, 49, b. and *Brid.* 100. *Hat.* 84. *quidam*, found by Special Verdict, doubted if good.

In Trespass, the Defendant pleads a special plea, and justifies; the Plaintiff replies *de Injuria sua propria*; but did

not Traverse *absque tali Causa*; Issue and Verdict for the Plaintiff, Judgment staid, and Repleader awarded: For here is no Negative but an Affirmative of the first Declaration; but no denying the Defendant's plea by the *Impa.* *Jennings versus Lee*, M. 24. Ca. 1. B. R. Sti. 150, 151.

In Trespafs, the Defendant justifies his Entry, by Vertue of a Lease for Years; and adjudged no good plea, amounting but to the General Issue. *Jaynes Case*, 1651. in B. R. so 2 Cro. in *Traver*, the Defendant pleads Sale in Market Overt; not good in *Traver*; The Defendant pleads, that A. was possessed of Goods, and sold them to the Defendant, and retained them in his Hands, and sold them to the Plaintiff; and they came to the Defendant's Hands, and he converted, ill; amounting but to the General Issue, and leave no Color for the Plaintiff's Action; whereupon a Writ of Enquiry was awarded, and not ruled, for that the Defendant pleaded Not Guilty, Sti. 355. 2 Cro. 165, 319. *Hob.* 187. 1 Cro. 112. 2 Cro. 146, 147. 169, 435, 532. 555.

In Trespafs, the Defendant pleads the Statute of *Limitations*; the Plaintiff replied,

plied, that he sued an Original within six Years. *Et hoc pet' quod, &c.* an ill Conclusion: For thereupon he lies upon the Defendant, and binds him to an Issue, which he cannot pass over; but he should have ordered his Plea, *Et hoc peratur, &c.* *Whitehead versus Buckland, Hill. 1651. B. R. Sti. 401, 402. Tel. 138.*

Trespass for taking and Imprisoning him such a day; the Defendant justifies by Warrant on a *Capias ad Satisfaciend'*; the Plaintiff shews, that after the Writ issued, and before executed, he paid the Money to the Sheriff, who gave him a *Supersedeas* to all Bayliffs, &c. and the Defendant Arrested him; whereupon he shewed him the *Supersedeas*, who yet detained him an Hour: The Defendant says, he was not Letter'd, and took that time to advise; Whereon 'tis demurred, and adjudged for the Defendant, not on the Matter in Law; but the plea for the Declaration, charges him with a taking and imprisoning, and the Replication, with a detaining only, so a Departure. *Stringer against Fanlake, 3 Cro. 404.*

Trespass for breaking two Gates and three Pearches of Hedging, the Defendant prescribes to go in Preambulation  
 T 4 that

that way in *Easter Week*, and given the Plaintiff two Gates and three *Pearches* of hedging, he broke them, and upon Demurrer, adjudged the *Plea* ill, because he says not *predictum*, and the two Gates and the three *Pearches*, may be other than those laid in the Declaration. *Gooday* against *Mitchel*, 2 *Cro.* 441.

In Trespafs against several that entered to take the Corn, whereto one of them had Right upon the Determination of a Lease, depending on a Lease for Life, ended: the Defendant pleads Not Guilty, and all the matter found specially, though their Entry were lawful as in the Right of one, yet it being by a License in Law, which must have been pleaded, and is not to be given in Evidence, or by a special Verdict, for that Cause, Judgment was against them, for their entring, though against the Plaintiff as to the taking the Corn. Sir *Henry Knivet* against *Powle*, &c. 2. *Cro.* 463. 464.

In Trespafs, the Defendant justifies Damage feasant, the Plaintiff made a new Assignment, the Defendant justifies there for an Herriot, the Plaintiff demurred, supposing it a Departure, but adjudged not; for, by the new Assignment, the  
Barr

Barr is out of doors, and that in the Replication, is as of a new thing, and could not be pleaded otherwise, for, it may be, he took one on Damage feasant, and the place mentioned in the Barr, and another for an Herriot in the Replication. *Odyham against Smith.* 3 Cro. 589, 590.

Trespas for taking an Hide, the Defendant justifies, because the Mayor &c. of *London* is seized of a House, called *Leaden-Hall*, and 'twas there Damage feasant, for he by &c. The Plaintiff replies, that *Leaden-Hall* is an ancient Market on Fridays, and he bought it there, and had it on his Back to carry away; and though objected, the Replication not good, because he concludes not, *que est eadem*, &c. because he varies from the manner of the Caption, and by his Plea, takes from the Plaintiff his Authority, yet resolved good without it agreeing with him in the time and place of the Caption. *Sawer against Wilkinson.* 3 Cro. 627, 628.

In Trespas, one as Bailiff, pleads *quod presentat' existit*, that such an one surcharged the Common, and for that was amerced, therefore distrained: 'tis good without saying *in facto*, that he did sur-

furcharge the Common, for he is to take notice of no more than what is done in Court. *Volleston* against *Alimond* 3 Cro. 748. 386. com. 1. *Leon.* 292. 2 Cro. 582.

Trespasß for taking two Hides, the Defendant justifies for a Distress, the Plaintiff replied, that he tanned them, the Defendant rejoyned, they could not keep else, he did it to save them; ill, and a Departure. *Duncomb* against *Reeve* and *Green.* 2 Cro. 783.

Trespasß, the Defendant pleads, that he is *Clericus & seistus de Rectoria in Jure Ecclesie*, and prescribes, that he and all his Predecessors, Parsons of that Church, have had a way, and so he says, not that he was Parson; and so it was objected, he had not enabled himself to make a Prescription, yet, saying he is seized *Jure Ecclesie*, it tant' amounts and is good. *Dom. Sandr.* against *Pender.* 3 Cro. 8. 98.

In Trespasß, the Defendant justifies, because, *per quandam Indenturam*, A. bargain'd and sold Land *habend'* to B. the Plea ill, because not said in the Premises to whom he being, &c. but 'tis the *habend'*, and the Granter and Grantee, must be named in the Premises; but,  
be

because the Plaintiff replied, *Quod bene & verum*, that A. granted to B. that is, a Confession to whom the Grant was, and mends it, *Bustard against Collyer*. 3 Cro. 899.

Trespas, the Defendant prescribes for Estovers at all times, except fawning times; the Plaintiff made an ill Replication: the Defendant demurs, though the Bar was ill, the Defendant not shewing, that at the time that he cut, &c. was not fawning time; yet, he having demurred on the Plaintiff's Replication, the Court would not to the Bar, but no Judgment of the Plaintiff's ill Replication, *Russel against Booker*. 2 Leon. 209. 210.

Trespas for Battery, the Defendant justifies, *Molliter manus imponendo*, in defence of the Possession of his House; the Plaintiff replies, *de Injuria sua absque*, &c. Verdict for the Plaintiff, and Judgment, Replication good, for the principal is the Battery, *Hall against Gerrard*. Latch 128. 3 Cr. 225. Latch 221. 273.

Trespas, the Defendant pleads, the Plaintiff is a Recusant convict, whom the Statute 3 Jac. 5. makes *excom* Judgment *de billa*, because it wants, *Es hoc para-*

*paratus, &c. per Recordum*; also, the Conclusion is unapt for the Plea, for the Plea is in Disability; the Conclusion is barr, but, it seems, the Conclusion is but form, and used by general *Demurrer*. And *vide* the form of several Conclusions, *Inde si Cur' vult cognoscere*. 2. *Al' person' sit ferra respond'*. 3. *Al' briefe Judgment ate' Br.* 4. *Al' accon' del briefe*. 5. *In barr' Com' apprest Bracton de except'*, and differ *Quando le ple al' br'*; of perempt' *quando neme*. If the pleading to the Writ be tryable, and tryed *per pais*, is peremptory to the Defendant, other if *Demurrer* upon *respond'*; but if the Plea be tryable by Certificate of the Ordinary, 'tis never peremptory; and if the Plea to the Writ be to the Action of the Writ, it seems peremptory, so Plea to the Action of the Writ, and Conclusion to the Writ peremptory, if demurred: one pleaded to the Action of *Avowry*, he shall not resort to plead in *Abatement*, after *Impar lance*: one pleads *Outlawry* in the Plaintiff, allowed. Dr. *Cudman* against *Grendon*. *Vide* 40 E. 3. 9 pl. *Abatement*, *Avowry* and Conclusion the barr. *Latch* 177, 178, 179. Co. 11. rep. 52 a. and 1 Cro. 117.



Trespass, the Defendant justifies as Executor, the Plaintiff says, that the Defendant was annulled upon Appeal to the Court of *Rome*, and so not Executor, if the Conclusion good; diverse of opinion *semble*, as well as where one pleads a Divorse in the Spiritual Court, and so not his Wife. *M. 2. R. 3. fo. 22. pl. 51.*

In Trespass for Misprision, the Defendant pleads, that Robbery had been done, and that he being a Watch-man, and the Plaintiff coming through the Town in the Night, he stopped him, to see what he was: doubted if not double, for he might stop him generally, either under Suspicion, or particularly as a Night-Walker, being a Watchman. *H. 4. H. 7. pl. 2.*

Trespass against two Defendants, they Justifie, *Et hoc paratus ut Justific' exceptionis*, taken because it should have been, *Et hoc parat' sunt. 1 Cro. 413. 414.*

Trespass for taking his Apprentice, Plea, that the Plaintiff discharged him, not good; for he cannot be Apprentice but by Indenture, and then he cannot be discharged but by Deed, no more than one Covenant to build me an House in Covenant to plead a Discharge of the

the Building, unless he plead it by Deed,  
21 H. 6. 31, 32.

Trespass, Defendant pleads a Lease at Will made to him, by Vertue whereof he entred, and was possessed, and held good, without shewing of what Estate he was possessed; *Idem* in pleading a Feoffment, &c. For it may be doubtful in Law, as if made by an Infant, &c. Therefore more safe to plead the Matter, and to omit the Conclusion how he was seized and leave it to the Court, 35 H. 6, 63. b.

Trespass, the Defendant pleads, that the Plaintiff had nothing but in Common with J. S. &c. *per Cur'*, he ought to shew how Tenant in Common, viz. the Feoffment, &c. if of a Joynt Tenancy *personar*, &c. but not after, the Plaintiff, stands not on it, but says, he was sole seized, and some thinks the Law is, he pleaded a Tenancy in Common of the adverse side; but if he had pleaded on his own side, then I agree I must shew how, 3 H. 6, 56.

Trespass for Fishing in his several Fishings: the Defendant pleads 'tis not Freehold; and by some the plea is good, till the Plaintiff make a particular Title to the Fishing; *Idem* in Case of Warren;  
ren;

ren; but *per Tel.* and not denied; but not so for Common, because when one demands Common, it must be intended *in alieno solo*: But when one demands Fishing or Warren, it may be intended in his own Soyl: And so for the Defendant to plead *un' Fr' Tent'* a good plea *prima Facie*, till the other makes a Title; but *per Fortescue*, with a Traverse of Fishing, &c. 'tis good, else not, no Resolution: *vide Title Forrest per tout*: And Title Fishing *per tout*, *plus de cest' matter*; and *vide 21 H. 6. 21 b.* and the Plaintiff makes Title, 18 H. 6. 29, 30.

Trespafs, *Quare lib' Warr' fregit, et Caniculos cepit*, the Defendant pleads, that the Plaintiff was seized and let to A. he by Command of A. took the Conyes; Judgment *le sans Title Mre'*, and after waves that, and pleads *ut auter* Judgment, *si Acco' per Danby*, on plea, because the Warren passed not by the Lease of the Land, and one may have Warren in his own Freehold. Note, he may plead Title under the Plaintiff himself; and Note the General Issue; and Note after he pleads the Freehold in a Stranger, who let *ut supra*; and that he by Command of A. &c. *absque hoc pt'*, the Plain-

Plaintiff has any Warren there. *Jenny*, that is, doubt the Freehold in a Stranger, and traverse of the Warren; and thereon he Demurs, *L. 5 E. 4, 54.*

Trespas for cutting Trees, Defendant makes Title to the Lord in Right of his Ward; and that he cut *prout sibi bene licuit*, *Danby* Chief Justice, and the Conclusion ill: For it appears waste and unlawful, *Marle*, & *mal Opinion ut mihi videtur*, 'tis Lawful, *quoad* the Plaintiff; and good: For before the Statute of Waste, Lessor, or Ward had no Remedy against the Lessee or Guardian by Trespas; and now 'tis punishable only by Waste, not in Trespas; but it may be an Estoppel in Waste; therefore better to plead, he cut them for a Repair, *prout sibi bene licuit*, *L. 5 E. 4, 64, 89. b.*

Trespas for taking, beating and impounding his Cow, Defendant, *quoad ven' vi & armis*, and pleads Not Guilty, and *quoad* the taking and impounding justifies for a Distress; ill, not answering the Beating. *Copeley* against *Piercy*, *Trin. 19 Car. 6. B. R.*

Trespas for taking Cattel, Defendant justifies, Plaintiff replies and avoided it, & *hoc &c. unde petit Judicium si ab Ad-*

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one *præcludi* ; ill, being specially demurred on, it ought to be *petit Judic' et dampna sua sibi adjudicari*. Lady Broughton against Holly, Tr. 21 Car. 2. B. R.

Trespafs for Battery, Defendant pleads *for Assault demesn*, Plaintiff replies, the Defendant would have rid over him, and he *molliter* assaulted the Defendant in defence of his person ; and so the Battery was of his own Assault, *qui est idem insultus* : In the Barr, the Defendant demurs, and Judgment for him for the Replication *molliter* assaulted ; ill : it should have been *molliter manus imposuit*. Jones against Trysillian, Tr. 21 Car. 2 B. R.

Trespafs for taking his Cattel, Defendant justifies damage *feasant* in his Free-hold, Plaintiff replies, and claims Common to a Messuage, &c. Defendant rejoyns, that he set sufficient Common for all the Cattel, *levant and couchant* in the Messuage, Plaintiff demurs, and objected he should have averred sufficient Common to the Messuage for all *levant*, &c. for at that time he might not have so many *levant* as he had right of Common ; for but adjudged the Rejoynder ; good. Leech vers' Mickley, H. 21, 22 C. 2. B. R.

Trespafs, Defendant justifies as Owner of an House, and says, That long before the Trespafs, he was *et adhuc seisis existit*, and doth not say *necnon tempore*

*Transgression' prædict'*; yet per *Hob. Winch* and *Hutton*; good. *Grise* against *Lee*, *Winch* 16, 17.

Trespas for Battery of *A.* and *B.* his Servant, *per quod servitium amisit*; Defendant justifies, because *A.* and *B.* would have erected a Building to the Nuisance of his Lights, and on demurrer, adjudged ill, because he says, not as Servants, or by command of the Plaintiff: And then he answers the *quod servitium amisit*, which is the Gift of his Action. *Norris* against *Baker*, *H.* 13 *Jac.* *Bridg.* 47.

Trespas for entring and breaking his Close, and driving his Cattel; Defendant justifies as to the Entry, and driving the Cattel; Issue of it and Verdict but Judgment against him, because he proved not the Breach as well as the Entry. *Praunce* against *Tuckle*, *P.* 8 *Jac.* *B. R.* *Rot.* 138. 1 *Bull.* 164.

Trespas *str. May*, Defendant Justifies 7 *May*, *que est eadem*, &c. and on demurrer, adjudged a good Plea, without a Traverse; and if he had Justif of the same time, he need not say, *que est eadem*; but at another time he must. *Vastere* against *Taylor*, *H.* 8 *Jac.* *Rot.* 1337.

Trespas for Assaulting, Wounding, Taking and Imprisoning the Defendant; *quoad* the Assault and Wounding, pleads Not

Not Guilty; and as to the Taking and Imprisoning, justifies; and on Demurrer, ill; because he justifies not the Assault; and there could be no taking without the Assault, and the *quoad captionem* and Imprisonment, does not imply, and include the Arrest. *Wilson against Dodderidge, Hill. 12 Jac. B. R. a Bulstrode 335.*

Trespafs, Defendant makes Title by Descent from J. S. to himself, as Heir; Plaintiff demurrs generally, resolved then of the not saying, how Heir, but forme and amendable. Duke of Newcastle against Wright. M. 18, Car. 2. B. R.

Trespafs for breaking six Closes; Not guilty to two *pedibus ambulando*; for the rest *pedibus ambulando*, he justifies for a way: upon which Issue. For the Trespafs *cum Averis*, he pleads want of Inclosure. The Plaintiff saith, the Inclosure was good, and the Defendants Cattel unruly, *absque hoc*, that they were out of Repair; upon which, the Defendant demurrs, and for cause shews, that the matter of Inducement is idle. Opinion of the Court was, that 'twas good, and the Traverse necessary upon that Inducement; that an Inducement is not material, a man may have many

if the Issue offered be single: resolved the Replication good. *Parnell* against *Row*. Anno 15 Car. 2. in B. R.

Trespass, *Quare clausum fregit & cuniculos suos ad valentiam*, &c. Verdict for the Plaintiff; moved in Arrest of Judgment, that it ought not to be *ad valentiam*, of a living thing, but *precii*. 2. That it ought not to be *cuniculos suos*: resolved by the Court, 1. *Ad valentiam* was but matter of Form; 2. That it shall be intended, that it appeared upon the Evidence, that they were domestick Coneys, and that the Jury were directed by the Judge: Also, that the Jury gave not any greater Damages in Respect of Property, alledged by the Plaintiff in his Count.; Judgment for the Plaintiff *per totam Curiam*. Sir Orlando Bridgman also declared, that the Opinion in 1 Cro. 15 Car. Child against Greenhill, that of Deer in a Park, or Coneys in a Warren, a man might say, *suos* is not Law; and contrary to *Coke*, lib. 7. Case of Swans. *Saywell* against *Thorpe*, 16 Car. 2. in C. B.

Trespass, *quare cepit*, &c. 100 Oves; Judgment for the Plaintiff, Damages 2 *d.* after which, upon another Action for the Conversion, it was resolved, that the damages were only for driving them away,



way; and not for the Conversion, 1 Cro. 36. *Lacom* against *Bernard*.

He that hath the possession of an Hawk may have an Action of Trespafs for striking and killing her. 1 Cro. 18. *Sir Fran. Vincent's Case*.

Trespafs, a man after he is arrested upon a *Latitat*, tenders Amends according to 21 *Jacobi*; resolved it comes too late. 1 Cro. *Watts* against *Baker*, 264.

Trespafs lies of Trespafs done in an Hamlet, *Yelv. Lapworth* against *Wast*. fo. 77.

Trespafs, the Plaintiff lays it in an Acre bounded &c. with Abuttels; the Jury found it to be in *Dimidio Acre infra script*, 'tis good; also; if the Jury had found it to be half an Acre, whereas it was assigned an Acre, 'twere well enough. *Yelv. Winkworth* against *Man*, 114. But in an *Ejectione firma* 'twere uncertain, and void. *Yelv. ibid.* & 2 Cro. 183. 2.

X

Wager

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## *Wager of Law.*

**I**N Debt for an Amerciament in a Court-Baron 'tis said one cannot wage Law, But two or three Presidents are there cited, where in such Cases Wager has been, *Mo. Pl. 430.*

In Debt by an Attorney for his Fees the Defendant cannot wage Law, But for Monies laid out by him as a Solicitor he may, *Rolls versus Jermin. Mo. Pl. 500.*

*Tenetur* that the Defendant cannot wage Law in Account for the profits of Lands, *Papworth versus Archee. Mo. Pl. 670.*

A wager of Law may be done by eight, ten or twelve hands, As the Court shall appoint; The Party is to swear directly that he oweth or derayneth nothing, The Compurgators, that they beleive that he oweth or deraineth nothing, *Term. Ley. 341.*

*Cooke* sayes Debts by simple Contract, are forfeited by Outlary, though it puts by the party his Wager of Law, and so he sayes

sayes - is the latter opinion of the Books and of the Judges now, And he sayes in every *Quo minus* by the Kings Debtor it puts the Defendant by his Wager of Law, for the benefit of the King though not party, *à fortiori* where the King is adjudged party, *Slades Case*, Co. 4. Rep. 93. a. 95. a. b. 9 Rep. 88. a. 89. b.

In Debt for Arrearages of Account before one Auditor, the Defendant may wage his Law, because not within the Statute of *W 2. Ca 11.* unless two Auditors, And so if the Lord be found in *Surplus* in Debt against his Servant, it may be waged, because not within the Statute, which is made only as to Accountants, the rest being determinable at Common-Law, *Debands Case* 38 H 6. 5. b. contrary to this last, Co. 10. Rep 103 a.

'Tis said that *Ley gager* lies not before Justice of Peace or Justice of Oyer and *Terminer* or any other inferior Court, but those at *Westminster*, Therefore an Information upon 23 H. 8. against Brewers to be brought at *Westminster*, not in the proper County, because the Statute, *Ousts Ley gager*; and so intends such Courts wherein it lay. *Vide Kitchin.* 494. b. *Ley gager*, the proper Tryal in Court-Baron, and *Per Pais.* 1 Cro. 79. 104. Co. 4. *Inst.* 64. 65.

Commissioners of Bankrupt assign a Debt due by simple Contract to the Bankrupt; in Debt the Defendant may wage Law against the Assignee of the Commissioners, as well as he might have done against the Bankrupt; though obj. they coming in by Act of Parliament, 'tis *quasi* a Debt of Record, for that alters not the Law: *quoad Wager. Morgan against Green.* And so 'tis adjudged also, 2 Cro. 105. *Bradshaw's Case*, and *Noy* 112. 1 Cro. 135. 2 Cro. 105.

Debt by an Attorney for his Fees, Defendant cannot wage his Law, because the Plaintiff was compellable to be an Attorney: but in Debt, by a Serjeant at Law, for 10 *l.* to be of his Counsel, for two years, the Defendant may wage Law, yet *dict.* the Serjeant was compellable to be of his Counsel, but it seems, not for two years, nor are those his certain Fees appointed by the Law. 3 H. 6. 33. b. 34. a. In Debt, for 20 *l.* by Serjeant at Law. *Good.*

Debt against a Successor of an Abbey, and Counts of a Sale of Goods, by Deed to the Predecessor, which came to the use of the House, it seems the Defendant may wage Law, notwithstanding the Contract was by Deed, and by the Predecessor; for, the Deed binds not, had it not come to the use of the House: and that being it which maintains the Action, 'tis not material, though it

it was the Predecessors Contract, *Sed ibidem* by *Ascue*, and not denied: If I sell Goods to the Servant of J. S. and they come to the use of J. S. he cannot wage Law, because *de anter* Contract: but if my Servant sells my Goods to J. S. in Debt he may wage Law, because 'tis my Sale by my Servant, *qu. Diversitatem.* 21 H. 6. 23. a.

Detinue of three Tallies, the Defendant wages Law; and so it seems he might, if it were a free Obligation. 21 H. 6. 30. a.

Detinue and Counts of a Delivery in *London*: If the Delivery were in *Middlesex* the Defendant may wage Law by *Newton*, and not denied, *Quia non detinet modo & forma*, &c. And so if in Debt, and suppose the Delivery in *Middlesex*, and it was in Truth in *Essex*. 21 H. 6. 25. b.

In Detinue of Charters and other Writings, the Defendant wages Law as to the other Writings; but as to the Charters only, he pleads in Bar 38. H. 6. 21. In Detinue of a box of Charters sealed, it seems he may wage, unless he counts of some Inspect. 21 H. 6. 24. a. 22. H. 6. 15. b.

In Debt against a Lombard, the Receipt is to be read to him in the Language which he understands, and in his own Language he is to wage his Law, not in *French* or *Latine*. 21 H. 6. 42. a.

Debt against one, and counts that he set *A.* and *B.* to board with the Plaintiff, at 15 s. a Week; the Defendant wages Law, and so it seems might *A.* and *B.* (the parties that took the Board) have done, if the Action had been brought against them. 22 H. 6. 13. b.

Debt, and Counts of Arrearages of Account before Auditors. It appears, the Parties by Deed submitted the Account to Award of Arbitrators, who awards 20 l. for which, the Action is brought; the Defendant wages Law, and may, for this is but an Award, and not Arrearages, found by Auditors of the Account, and *ibidem*, 23 H. 6. In Arrearages of Account the Defendant pleads *Riens lui doit*, and prays, the Attorney of the Plaintiff might be examined; who could not; if the Defendant wage Law, he shall not make it present, but have day to do it. 22. H. 6. 41. a. 33. H. 6. 24. a.

In Debt, upon an *Infimul computaverunt*, against four whereof, one was out-lawed, one of the other waged his Law alone, and though opposed, resolved he may do it, and so did make his Law; and the Plaintiff was *Non suit*. Hob. 244. *Effington* against *Butcher*.

Wager of Law must be *duodecima manu*, the Party himself *de fidelitate*, the other eleven

ven to be sworn *de credulitate*, so is equal to a Jury. *Vid. Mag. Ch. 1. 28 Co. 1. Inst. 295. a.*

When one has any thing of common Right, or by Course of Law, the same may be enlarged by Prescription, as the Lord has Court-Baron of common Right, and by Course of Law, all Pleas therein are determined therein by Wager of Law, yet the Lord may prescribe to determine them by Jury. *Co. 2. Inst. 143.*

In Debt, upon an Account before Auditors, brought either by the Master against the Accountant, or the Accountant against the Master for Surplus, the Wager of Law lyes : for the Auditors by *Westminster 2. 11.* are Judges of Record, the Statute being in the nature of their Commission. *Co. 2. Inst. 308.*

Where the Statute gives a Forfeiture to be recovered in any of the King's Courts, wherein no Wager of Law, Effoin or Protection, shall be allowed. *Per Co. 4. R. 55.* It may be in a Case where no Effoin lyes; for 'tis *Reddere singula singulis*; *viz.* There shall be no Effoin if they lye in the C. But 1 *Cro.* in *Faringdon* and *Comer's Case*, p. 79. and *Green's*, and *Girle's Case*, p. 104. the contrary is held by the Court. *Co. 4. Inst. 64. 65.*

In Debt, upon the Statute of Coppices, the Defendant would have waged his

Law, but could not, the Action being grounded upon a Statute, 9 H. 3. a. No Wager in Debt for Arrearages in Account before Auditors, *aliter*, on Account, to the Plaintiff. H. 10. H. 7. Pl. 18.

No Wager of Law can be against a Specialty, (as if I deliver a Charter to another by Indenture, and the Bailiff dye, Detinue lyes against his Executor, by reason of the Indenture) nor against a Receipt *Per auter maines*, in account. Dyer, 265. a. vi. 39 H. 6. 35. a.

Detinue on a Contract of Goods bailed, the Defendant may wage his Law, or plead *non Detinet*. Dy. 30. a.

In such Actions where the Defendant is put from his Wager in Law, there he may traverse a point that is but inductive to the Action, and not a point of the Action; as in Debt, upon a Lease he may plead *non dimisit*. In Debt, for Arrearages of Account he may plead *non computavit*; but in Debt, for Money or Wares, sold to him, he may plead *non debet*, and traverse, that he sold them. Dyer 121. b.

In Account, the Defendant pleads *ne unque Receiver*, and waged Law thereon, and had day, and at the day, would have waived his Law for part, and confessed the Action for it, and waged Law for the Residue: *per Curiam* he cannot without the Plaintiffs assent. Dy. 261. a.

'Tis



'Tis held, that at the Common Law, he that waged Law in a Court of Record, was to bring with him *Fideles Testes*, where-with *Glanvil* agrees, *Lib. 1. C. 9.* But in inferior Courts, one might wage Law without Witnesses; to prevent which, was *Magn. Ch. 28.* made *Nullus Ballivus ponat aliquem ad legem, &c. sine testibus fidelibus ad hoc indultis.* Others hold, that *Ballivus* there extends to all Judges. *Co. 1. Inst. 168. b.*

An Infant cannot wage his Law, but the Husband and Wife, for the Debt of the Wife, may: *18. E. 3. 53. a.* A Mute wages Law by Signs. *Co. 1. Inst. 172.*

Wager of Law is not allowed in any case where a Contempt, Trespass, Deceit or Injury, is offered; but 'tis allowed in some Cases, in Debt, Detinue, and Account; 'tis not allowed when there is a Specialty. *Co. 1. Inst. 295. a.*

One Infamous cannot wage Law, nor an Infant, but a Feme Covert with her Husband, may. No Wager lyes where the Suit is for the King, or his Benefit, by *Quominus*; no Wager against an Infant. An Alien must wage Law in his own Language. No Wager against Receipt, *Per auter maines* on Account, unless his Wives or his Companion. Bailiff of a Mannor cannot wage Law in Account, in Debt, for Rent, or  
Deti-

nue, for a Lease no Wager, because sounding in the Realty.

It lyes in Debt for a Fine in a Leet, because a Court of Record ; otherwise, for an Amercement. No Wager in Debt upon Account, before Auditors ; otherwise, if but one Auditor. No Wager in Debt by a Goal-er for Victuals, nor against an Attorney in Debt for his Fees, nor against a Servant retained according to the Statute in Debt for his Wages. One charged as Executor, &c. shall not wage ; no Wager in Debt for a Penalty given by a Statute. *Co. Ent.* 118. *Pl.* 1.

Error of a Judgment against an Executor in *Bristol*, upon a *Concessit solvere per* Custom, there to pay a Debt of the Testator, by simple Contract, because it takes from the Wager of Law, *Cur'* advise &c. *Wigg* against *Roberts.* *H.* 22. *C.* 1. *b. r.* *Rot.* 956. *Pascal* against *Spurning.* *p.* 1649. *b. r.* *Rot.* 75. *Sti.* 145. 198. 199. 228.

In Debt against Baron and Feme, for Beer sold to the Feme *dum sola*, they waged Law. So note, he waged Law for the Defendant. *Hucks* against *Holmes,* 3 *Cro.* 161.

Debt against an Executor for Money awarded to be paid by the Testator, it lyes not, for the Testator might have waged his Law, which the Executor cannot. *Hampton* against *Bower.* See *vide* *Latch* 213. *Symonds* Case.

no Wager of Law against an award, P. 1. H. 7. Pl. 18. 13. H. 3. Noy 96. No Wager against an Award, because the third Person cannot 3 Cro. 557. 600. 11. H. 4. 56. b. Wager in Debt, for the Son award.

In Account against A. as Bailiff of his Mannor of D. the Defendant waged Law, and had day to make it: but, at the day, 'twas ruled, that *Ley gager* lyes not in this Case, being a matter tryable *per Pais Archees* Case. 3 Cro. 579.

Debt on a Contract against two, one pleads *Nil debet per Patriam*, the other waged Law, he cannot, but must plead *per Patriam*, being joyntly concerned in one Contract. 3 Cro. 645.

Debt sued by one in Chancery, a Servant to the Lord Keeper; Defendant, as to part waged Law, and to the Residue pleaded *Nil debet per Patriam*. And being sent into the King's Bench, 'tis doubted if he may make his Law good, but, *de bene esse*, it was done, *Audley* against *Franke*. 3 Cro. 648.

In Debt for Money on sale of Land, doubt if the Defendant could wage Law, being on a real Contract, and resolved he may, and he did make his Law. *Miller* against *Eastcove*; and so 'tis held by *Newton*, 22 H. 6. 11. a. and not denied, 3 Cro. 750.

In Account against one as Bailiff he cannot wage his Law, but as Receiver he may.

*Shes-*

*Sheffield* against *Barnefield*. Note, it was Account against him as a Bailiff of Town-goods, as Merchandize, not a Bailiff of a Mannor. 7 Cro. 790.

Debt against a Defendant for his Dyet, he would wage his Law, but could not, and pleaded, *ad Pais. Bish* against *Walford*, *vid.* 39. H. 6. The Court divided in this point, H. or E. 19. H. 6. 10. 4. *Per totam Curiam*, he may wage in Debt for Dyet. 3 Cro. 818.

In Account, upon a Receipt by the hands of the Plaintiff's Wife, the Defendant was to wage his Law, because that is not a Receipt *per auter mains*, upon a Receipt by the hands of the Plaintiff's Wife, they being one Person. *Goodrick's Case*. 3 Cro. 919.

In Debt, against the Abbot of D. on a Contract by the Predecessor for Goods, that came to the use of that House, the Defendant would to wage Law, *Et per opinionem Curie*, he may: and *vide* there divers Cases, where one may wage Law on anothers Contract. *Prior de Dunstable's Case*. P. 1. H. 7. Pl. 18. M. 13. H. 7. Pl. 2. H. 22. E. 4. Pl. 39. H. 6. 22. 4.

In Detinue of a Bailment *per auter mains*, the Defendant may wage Law; so in Debt, on a Contract *per auter mains*, otherwise on Account on a Receipt *per auter mains*: for there

there the Receipt is traversable; but in the first Bailment 'tis not, but the Detinue. *M. 18. H. 8. Pl. 15.*

In a Writ of Right of Advowson, Grand Cape issued for default; the Defendants came and offered to wage Law of *Non-Summons*; and because some said the Writ was peremptory, so as he could not have another, the *Ley gager* was respited. *Tr. 27. H. 8. Pl. 2.*

In Account, upon a Receipt at the Plaintiff's hands, though by Writ the Defendant shall wage his Law, and by Detinue upon a Bailment by deed, for he might take them again; and 'tis that *Detinet* is the cause of Action; not the Bailment. *Er. 27. H. 8. Pl. 14.*

Debt against *J. S.* he waged Law, and at the day, appeared to make it, the Plaintiff said, there is *J. S. Senior*, and *J. S. Junior*, and the Action brought against the elder, and this is the younger; and *in tant'* the elder makes default, prays Judgment. *Er. 5. E. 4. Pl. 22.*

In Debt for dyet, the Defendant may wage Law, whether the dyet were for himself or another. *22. H. 6. 13. b.* But on a Lease of a House, &c. he cannot, but on a Lease of Goods or Chattels he may. No *Ley gager* in Debt for dyet of a Pentioner. *P. 9. E. 4. Pl. 1. H. 15. E. 4. Pl. 2. Co. 9: 487.6.19 H.6.10.4.*

Debt

Debt on a Contract, the Defendant pleads the Contract was made with him and *Br.* and abates the Writ ; yet in another Action he may wage Law, though herein he confessed the Contract, for, he may have pleaded it after, *per Littleton*, and not denied, & *ibidem*, by him. In Debt against Baron and Feme on a contract by the Feme *dum sola*; both shall wage, though he a Stranger to the Contract ; for, by the Marriage he hath made himself lyable to it. And to this last agrees *M. 15. E. 4. Pl. 4. Sed vide 33 H. 6. 43. b.* If she make default at the day, 'tis the Default of both, and binds the Husband. *9 E. 4. 2. 4. b.*

Debt and Counts of a Retainer, to shape and make such Cloaths ; In this case, the Defendant may wage his Law, and in *similiter*, not against a Labourer, compel to wage by the Statute, *1 H. 6. 23. b.* Not wage in debt by a Servant for his Wages. *H. 16. E. 4. Pl. 3. Mo. Pl. 971. Co. 9. R. 88. a. b.*

Detinue of a chain of Gold of four ounces weight, of the value of twenty pounds, though the Defendant have, and detain them, yet, if it be but two ounces weight, he may wage Law, as if it were a black Horse, and the Suit for a white one : but if the Count were of a thing certain in the quant. or qual. as six yards of cloath, tho  
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he mistake the Price, as ten Shillings for eighteen Shillings; yet the Defendant cannot safely wage law, Count of a Contract for 500 *l.* It was for 500 *l.* to be paid in Jewels, Defendant waged law. 39 *H. 6.* 34. 35. 3 *H. 6.* 49. *b.* Count of a Contract for 40. *l.* plead that it was for 20 *l.* and wage law for the rest. *P. 22. E. 4. Pl. 8. 9. Mo. Pl. 1. 48. Vide 39 H. 6. 34. 35.*

Debt by a Keeper of the Tower, for Manger and Boyer for one committed there for Treason; Defendant cannot wage law, *Et diff.* for debt by a Priest, for his Salary, Defendant may wage law: 28 *H. 6.* 4. *b.*

In Account of Receipt *per auter mains*, no Wager lyes, because the Receipt is the cause of the Action, and that's notorious *al pais* being *per auter mains*: but in Detinue on a Delivery *per auter mains*, Wager lyes, because, not the Livery, but the Detainer, which is, in a manner, the cause of Action; but in next Case, 'tis the Usage which makes the law of Wager; therefore in debt it lyes, in Trespass it lyes not 33 *H. 6.* 9. *a.*

Debt on a Judgment in Court-Baron, the Defendant pleads, *Nul tiel* Judgment, 'tis no Record, therefore tryable *per Pais*; Defendant not wage Law; 34 *H. 6.* 49.

No Wager lyes in debt, or Arrearages of Account before Auditors, but that was not at the Common Law, but is given by the Statute

Statute of *Westminster*, 2 Ca. 11. But though the Statute gives it only in Case where the Lord sues for the Arrearages against the Receiver; yet it seems by *Needham* and *Frisot*, the Wager lyes not where the Bailiff or Receiver sues the Lord for Surplus on the Account, 38 H. 6. 5. 6.

Debt for Wages and on a Reteigner to serve in all Occupations, the Master wages law, because it may extend to other things besides Husbandry, which the Reporter holds to be otherwise; for, the Service and Wages being entire and no Wager for part, he thinks there should be none for the rest; for, *Magis dignum trahit ad se minus*, 38 H. 6. 13. 14.

Party wages Law, and day given to make it; either of the Parties at that day may be excused by Essoin; but if either make default, it is adjudged against him; or if the Defendant do not bring twelve sufficient men, 'tis a default, as if any of them prove Execution, Attachment, &c. *Et ibidem* if in Replevin the Plaintiff say that the Defendant kept himself out of the way, that he could not tender Amends, and bring his Suit of it, Defendant may wage law of it; but if he bring no Suit, he need not wage; for against one single Voice he need not wage; whereby, since (*moy semble*) he means Proof, and so *Selden* upon *Fortescue* expounds it. *vid. Brit. 60. a.* Debt



Debt and Counts upon a Lease for three years, of certain Sheep, the Defendant wages law, *per Cur'*, he may, though not in a Lease of Land; *Vid. 9. E. 4. 1. b. 1. H. 6. 1. a. b.*

No Wager in Law lyes in debt by a Servant for his Wages, *sed quare*, for that seems, such a Servant only, as is retained according to the Statute, 3 *H. 6. 33 B. 34. a.*

Debt and Counts of Reteigner to scald his Hogs, and foul by the Year, taking 100 *s.* The Defendant may wage his Law, and so he may upon a Retainer to serve him at Plough a year, and to find Ploughs, &c. for these not Reteigners according to the Statute; and so of a Reteigner to be his Counsel for a year, &c. 3 *H. 6. 42.*

One waged law, and brought twelve with him, one whereof was challenged, for that he was under Age; and he was tryed by Inspection of Court, to be of full Age, whereupon, the Party made his Law, and went quit; 8 *H. 6. 15. b.*

Debt of a Box of Writings and Charters, and Counts of one Charter in Special. To which, the Defendant pleaded *non detinet*, and to the rest, wages Law, & *bon*, for, if one Count of a box of Charters, and shew not in Special, he may wage Law as to all: for, unless one Charter be certainly set out  
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the Box, and all counted Chattels: *Vid.* 14. H. 6. 1. 2. Detinue of Goods and Chattels, defendant wages Law *quoad* the Goods, and pleads to the Charters 44 or 4 E. 3. 41 b. and 19 H. 6. 9. b.

Debt, Defendant having answered in Court, that he bought, &c. to the use of the King, waged Law, and was admitted; for, notwithstanding he acknowledged the debt, it being a Contract, and he might have paid (or pleaded) it in *pass*, the Wager allowed, *simile*, 11 H. 4. 28. and 3 H. 4. 40. 7 H. 4. 7. 2.

Account by the Husband or an Abbot, and counts of Receipt *per manus de Son-feme*, or *de Son Comoine*, good, and needs not count of a Receipt by his own hand; yet, 'tis as a Receipt by his own hand, and the Defendant may wage Law: And so *vice versa*, in Account against Baron or Abbot, Count of Receipt *per manus del Feme ou Comoine*, *le Defendant*; and so is 2 H. 5. 2. b. *vid.* 47 E. 3. 16. 13 E. 4. 8. 2.

Debt against two, one makes default, the other wages law, and at the day makes it. The whole Writ is abated, *Et quer' nil capiat* against both entred; where, by the Acceptance of the Law *quoad* one, the whole Writ is abated. *Vide* 41. E. 3. 16. or 2. b.

*Precipe quod reddat* against two, one makes default after Joynt-wager, the other joyns, and

## Wager of Law.

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and makes the Law. And it is accepted, though the defendant opposed it, the defendant recovered some of the other Moyety. Note, here both waged joyntly at first, *vide* 48 E. 3. 13. b. *Cessavit* against two who waged law, one comes to make it, Seizin is prayed of the others Moyety that made default; for, if the Law of the one be accepted at first *per Wisbingham*, all the Writ abates. But here when he prays Seizin of the entire, for the default of one, it was denied, and upon the whole it seems, if one make default, Seizin of his part must be pr. first, else, by acceptance of the others Law, the Writ abates, And if Seizin be granted of the Moyety, it seems it is conditional; for, if the other makes his Law, the whole Writ abates *tamen quere*, and *vide* 3 E. 4. 21. a. 12 E. 4. 1. b. 5 E. 3. 9 B. and *quere* in personal Actions, not to be done in such case, for there no Seizin of part can be prayed. 40 E. 3. 35. b. *vid.* 40 E. 3. 40. 41.

Debt against a Bailiff for Arrearages on Account; obj. He cannot wage, &c. because in the Realty; but resolved he may, and so may he by 13 H. 7. 3. 6. If he had accounted, and was found in Arrearages before one Auditor. 43 E. 3. 1. 6.

Attaint on a Prohibition; Plea, that he sued out Sugg' to Prohibition, and therefore

he wages Law: doubted if *Ley gager* lyes, by *Brinknap*, it does; because the first Suit but for debt, in which *Ley gager* lyes. 44 E. 3. 32. 4.

The Servant retains one as Attorney for his Master, the Master makes the Servant Executor, and dyes: In debt by the Attorney against the Executor, he cannot wage Law, though the Master might; for, the Servant is bound by his own deed of Retainer, though he be sued as Executor, &c. And *per Finchden*, Baron may wage Law, if a Feme contract, and an Abbot, if his Monks: And so *Bro. Tit. Ley gager* 46 E. 3. 10.

Debt against a Bailiff for Arrearages found before Auditors, assigned in *pais* by the Master, the defendant wages his Law, *Et bene per Cur'*, though *Brookes* and *Bridges* say the Law is otherwise at this day, *quere*, since 'tis not before Auditors assigned by Court, *Et hic dicitur quod*, one may wage Law for a Sum recovered in a Court-Baron, because no Court of Record; yet 'tis found by the Suiter, and so 'tis said, 13 H. 7. 3. 6. *per Cousby*. 'Tis also here said, one may wage Law in debt for a Sum recovered in Trespass, but in Trespass *Ley gager* lyes not: 49 E. 3. 2. 3.

Debt in the detinue only for rent Corn, as 'tis agreed it must be, not being Money; and though 'twas upon a Lease for years, yet

yet being in the *Detinet* only, the defendant is admitted to wage Law, 50 *E. 3. 16. a. b.*

Debt against *J. D.* who appeared by Attorney, and ley gaged; and at the day, *J. D. Junior*, comes to make the Law: Plaintiff says his Suit is against *J. D.* the elder, & *per optimam opinionem*, *J. D. Junior* shall be discharged, and the Plaintiff shall have Judgment against the elder by default, and the Plaintiff be no longer delay'd. And so 'tis adjudged, 9 *E. 3. 20. b. 5. E. 4. 23. 26. 114.*

Annuity, defendant pleads a Refusal to give him advise upon Request; plaintiff offers to wage his Law, that he did not request him, denyed, because he cannot wage Law *de alieno*; from (then) he offers to wage Law, that he did not refuse; (then) *per Herle*, that admits, that he did request, and shews no performance on request; and if he requested, he did or did not perform, and when he sued not, if he did perform, it must be intended he did not *qu. of law gager* in such cases if it lye at all. 5 *E. 3. 55. b.*

In a Plea of Land the defendant wages law of *Non-summons*, and offers to make it *instante*, and *per Herle* (and not denyed) he may *Leygager*, and make it instant, 7 *E. 3. 24. a.* Account by an Executor, and counts of a Receipt *per manus Testatoris*, was *per*

*auter maines*, then his that sues *tamen quere*. In Debt and Account by Executor, 'tis said, defendant may wage his Law, *Et sic semble hic*. 7 E. 3. 61.

An Abbot is permitted to wage law of *Non Sum per Attornatum*, *quare* If a common person may do so also, though he must make it in person. 8 E. 3. 20. 4.

Prohibition of a Suit in Trespass *contra pacem*, the Sheriff comes, and says he is sued not *contra prohibitionem*, on the attachment, and tenders Law; denied, for in Trespass *contra pacem*, it lyes not, no more than in Count of a Receipt *per auter maines*; *non allocatur*, and that Law was received, and in 29 E. 3. 47. b. Debt lyes and grant of a delivery of goods by the Testator, *per auter maines*, defendant wages Law. So 30 E. 3. 24. 29 E. 3. 34. b.

In account, the defendant before Auditors says he paid the Money to the plaintiff; the plaintiff would have waged law, *That he did not receive it*, but the other alledging that he had pass'd it *per auter maines*, *non allocatur*. *Vide* 30 E. 3. b. a. Ley gaged, that he did not receive a Statute, Wine, and Cloath, in Satisfaction of a Debt, and doubted if it lye *quoad* the Statute; but the Clark said it is usual, 29 E. 3. 46. b.

Debt against two who wage Law, one makes default, the other his Law, *Nil capiat*.

*piat per hunc*; and the reason seems, that he having charged the two jointly, and the debt disproved *quoad* one, the Writ is satisfied in *totis*, yet *eodem folio* 6. in a *Præcipe* of Land against two, one makes *Ecy* of *non sum*; the Writ abates *quoad* him, and Seizin of Land against the other that makes default. Note, the first Action is in the personal and entire, the last in the realty and several. 38 E. 3. 33. a.

One wages Law, and at the day failed, and the Roll marked, and Costs taxed, yet on motion *sedente Curia*, the same day he was admitted, and made his Law, & *eodem in libro*. Pa. 44. *Ley gager* lyes not in debt for Releif, *Noy* 42.

Defendant had day to make his Law, and at the day, made Affidavit, that he was pressed to serve the King, and could not come, and they prayed farther, and denied for peremptory; but the defendant pleaded *al pais per advisamentum Curie*, and consent: *Asbford* against *Greenville*, M. 1. Ca. 1. *sed vide in Bulstr.* 186. He cannot wave his Law, and plead *al pais*, without consent. 3 *Bulstr.* 263. Affidavit, that he was sick, yet no day, but he pleaded *al pais*, 3 *Bulstr.* 316. on default, Judgment, and no day. *Ben.* 151.

Debt for Scavage, and declares that the Mayor, Aldermen, &c. time out of mind, have so much for Scavage, and the defendant brought so many Boards, whereby so much was due; defendant waged Law, and on demurrer adjudged, it lyes not on this debt grounded on a Custom Ma. &c. of London against *Delpesier*, Tr. 26. Ca. 2.b.r.



*Wast.*

**D**Evise to one for Life, Remainder to A. in Fee; Tenant for Life does wast, he in Remainder shall have an Action of Wast, but the Writ must be special, and shew that he was the Reversioner by Devise, not generally *ex assignatione*. *Hutton. 110.*

Lease, excepting wood and underwood, Lessee cuts Timber; it seems an Action of Wast lyes not, because the Wood was devised, and so not within the Statute. *Dyer 19. a. 1 Leon 61.*

In Wast it seems, that the defendant, if he never attorned, may either say *que riens passa*, and give in Evidence that he never attorned, or plead it. *Dyer 31. a. 231. a. b.*

In Wast, for cutting and selling Trees, the selling must be answered, as well as the cutting, for that is traversable. *Dyer 75. b. 90. b. Co. 1. Inst. 53. Hob. 104.*

If an house be ruinous at the Lessee's Entry, 'tis no wast to suffer it to fall, but to pull it down 'tis, and 'tis wast in the Lessee to cut Timber to re-edifie such an house, *per Dyer*; but I suppose not, for, if the house fall by Tempest, the Lessee may cut Trees to repair,  
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by Co. 1. Inst. 53. b. 54. a. contrary to Dyer 36. a. Co. 4. Rep. 63. a. 11. 81. a.

The general property of Trees remains in the Lessor, and the Lessee hath but particular Interest to take them; and in Dyer 'tis said, the Lessor cannot grant them without the Lessee's License. But Co. 11. Rep. 'tis said 'tis good to take effect after the Lease; which is yet a doubt upon Waller and Pettit's Case. Dyer 36. a. b. Co. 4. Rep. 36. b. 11. Rep. 48. b. 81. 1 Cro. 199.

Wast assigned, *quod amputavit & decapitavit quadraginta Fraxinus, & viginti Ulmas*, and adjudged it well lyes. Dyer 55. a.

Wast assigned, *Succidendo quercus*, the Truth was, he did not lop and top them; he may plead, *Nul wast fait*, and give the special matter in Evidence. Dyer 92. a.

Upon the Return of the Summons, 'twas said, *quod quer' obtulit se quarto die per Actorn'* without naming him; and though he was named in the assigning of the Wast, yet 'twas Error; and so it was that the Estate was not set forth in the Writ, though it was in the Action of Wast. Also, he shewed one Tenant for Life, by way of use, the Reversion to him, and said not *spectat vel pertinet*. Dyer 93. b.

Wast may be assigned in destroying the Planks and Mangers in a Stable, but then they must be averred, fixed to the Freehold.

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And so of letting a Brick-wal fall, but it must be averred that it was covered. 1 *Inst.* 53. a. *Dyer* 108.

Wast by a Bishop, moved to abate the Writ, because, 'twas *ad Exberedationem ipsius Episcopi*, where it should be *ad Exberedationem Ecclesiæ*; but no Resolution given. *Mich.* 10. *H.* 7. *Pl.* 8. *Ad Exberedationem ipsius A. B. & Ecclesiæ de S. Mich.* 42. *E.* 3. 22. b. *Dyer* 129. a.

Lessee of an house and Wood, covenanted to repair the house at his proper Costs, and took Timber to repair it; he is not charged with Wast, but in Covenant he is:

The same Law, if the Lessor had covenanted to repair it, and the Lessee had took Trees on his default. *Vide* 21 *H.* 6. 47. a. Lessee may plead in Bar of Wast, that the Lessor granted the Repair, and he took the Trees to do it in his default. *Dyer* 198. b. 314. a. *Dr.* and *Stud.* 66. b. *Perkins.* § 798. *Flow. Com.* 29. *Dyer* 32. a.

*A.* makes a Lease to commence in futuro, and before the Lease commences incloses *B.* The Lessee does wast, *B.* brings wast, supposing *quod tenet ad terminum, &c. ex Assignatione A. de quo idem defend' tenuit, &c.* and good, there being no other forme, though he never held of *A.*; for his Term was never commenced in *A.*'s time. *Dyer* 206. b. *Hutton's Reports*, fo. 110.

Lessor

Lessor grants the Reversion to *A.* who grants it to *B.* the Lessee assigns the Term to *C.* Form of the Writ denyed per *Justic' utriusque Banci.* *Dyer* 208.

*Scire facias* of a Fine, and Writ of Estrepement sued; one that purchased wood long before the *Scire facias*, is hindred to sell it. *Quere*, what Remedy? *Dyer* 110. *b.*

In wast assigned in taking a Furnace fixed to the Soyl; the defendant pleaded a Devise of it by the Termor, and removal of it by the Executor's Assent: It seems no Plea, being doubted if the Plaintiff ought not to have Judgment for the wast confessed. *Dyer* 272. *b.* *Owen's Rep.* 70. *Wentworth's Office of Executors, fol.* 36.

*Quid Juris Clamat* was brought upon a Fine, and after Judgment, and before Execution, a Writ of Estrepement awarded. *Dyer* 325. *b.*

In wast for cutting Trees, the defendant pleaded *quod fuerunt aridæ & cavæ, & putridæ in culminibus non existentes sufficiens Make-remium pro edificiis.* Two Judges held it ill, because not said *non portantes fructus nec folia.* *Dyer contra*, it tantamounts. But agreed *non existen' sufficiens maberemium ad edificand a-* lone, ill; for it may be fit for other uses. And to other he justified to make Posts for Inlo-fures, and that ill, because not shewed, that all those Trees were so employed. *Dyer* 332. *Mare pl.* 246. *A.*

A. and B. Joyntenants for Life, Reversion to B. make a Lease; they shall joyn in wast. And so if Tenant for Life, and he in Reversion make a Lease, they shall joyn, and Tenant for life shall recover *Locum vastatum*, he in Reversion damages. 1 *Inst.* 42. a. b. 1 *Le. on.* 49:

To cut down Timber is *Wast*, to suffer the young *Germina* to be destroyed, is *Destructio*; so if one when he has cut a Sale-wood lets the spring be spoiled, or stubs it up. Cutting Willows, Beech, Maple, &c. that stand in defence of the house, and stubbing up a quick set Hedge, is destruction: for all which, an Action of Wast lyes. 1 *Inst.* 53. *L. K. L. M.*

To suffer a ruinous house to fall down, that was so at one's Entry, is not wast; ytt, he may take Timber and re-edifie it: but if he pull it down it is wast. To destroy Glass, Wainscot, Doors, Furnaces, &c. fixed to the Free-hold, is wast. Cutting Fruit-trees in the Orchard or Garden, is wast; otherwise not. If a house be blown down by Tempest, Lightning, &c. the Tenant must in convenient time repair it. Destroying the Stock of Dove-houses, Warrens, &c. is wast. Where Timber is scant, to cut Beeches is wast. Lopping Oak, Ash, or Elme, or any thing to prejudice Trees, is wast. Making Charcoal of wood is wast. Felling Timber to repair  
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voluntary wast, is double wast. To dig for Gravel, Stone, &c. is wast, unless for Reparation of the house. To suffer a Sea-wall, or against a River, to decay, is wast. To take Timber, &c. to make new Fences, is wast. Tenant cuts Trees for Repair, and sells them, though he buyes them again, and employs them, 'tis wast. Burning a house by Negligence or Mischance, is wast. 1 *Inst.* 53. 40. *E.* 3. 15. *b.* Willows cut in view of the House, is wast. 40 *E.* 3. 25. *b.* So to cut Haisels in a Wood where there is no other Timber.

If one grants in his Lease that Wast shall be redressed by Neighbour, and not by Plea, yet he may bring an Action of Wast, for the place wasted is not otherwise recoverable. 1 *Inst.* 53. *a.*

If the Tenant repair houses before any Action of Wast be brought, the Action of Wast is not maintainable; but he must not plead *Quod non fecit vastum*, but the special matter. 38 *Aff.* 1

Reparation after the Writ brought, not pending the Action seems no Plea. 1 *Inst.* 55. *D.*

None shall have wast, unless he had the immediate Inheritance, yet an other may joyn with him against Tenant by the Curtesie with the surviving Partner, Joyntenant for life with him that hath the Fee. Where the

the Estate is determinable, the Wast is general, as Tail becomes Tail after possibility, &c. The Heir cannot have it of Wast in his Ancestors time, nor a Bishop of his Predecessor, nor shall Executors be punished for Testators wast. Aunt and Neece may joyn. 45 E. 3. 8. b. Gift to two and the Heirs of one, he that hath Fee cannot have Wast against his Joyntenant, but his heir may, if wast after, if the other survive, if the Reversion be not continued in the same it was at the time of the wast done, the Action is gone, though taken back again. 1 Inst. 53. D.

Wast lyes against Tenant by the Curtesie, and in Dower, though they have assigned, unless the Reversioner have assigned also. All others shall answer for their own wast, unless Guardians. And if the Guardian assign it lyes against the Assignee. Guardian shall not answer wast by an other, (because 'tis personal) unless he is Joynt-Guardian. If one recovers against him under Age, he recovers the Land, else only Damages. Infants, Feme covert, &c. shall answer Wast, &c. done by Strangers, and she for her Husband. Co. 1. Inst. 53, b. 54. a.

Husband Tenant for Life in his Wives Right does wast, she dyes, 'tis dispunishable; but if tenant for years in her Right, not; because the marriage is a Gift of it to him. Tenant for Life grants his Estate on Condition,  
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Grantee does wast, Grantor enters, Wast lyes against the Grantee, and the place shall be recovered. Lord not punishable for wast done by his Villein before Entry, Occupant punishable generally or specially; Tenant assigns, and takes the Profits, wast lyes against the Tenant. Wast done *sparfim* in Woods or Houses, all is to be recovered. No Action of wast lyes against Guardian in Socage, but Trespass or Account. 3 *Cro.* 357.

If Lessee take Trees, &c. to repair houses, 'tis not wast, though he was not bound to repair them as his Lessor covenanted to repair them; for, if it was *sans* Impeachment of wast for the houses, as the house was ruinous at his Entry: and this for that Favour the Law gives to houses of Habitation. *Co. 1. Inst.* 54. *b. a. Dyer* 194. 198. *b. Brook* 463. *Tst. Wast.*

Lease of lands, he may dig in open Mines, and if it were of lands and mines, if any were not open, he can open none new; but if none were then open he may open new ones. *Co. 1. Inst.* 54. *b. 5 R.* 1. 2.

Tenant for Life makes Feoffment, wast is done, 'twas upon Condition, Lessee enters for Condition broken; Lessor shall have wast. So Successor of a Bishop shall have Wast on his Predecessors Lease, for wast done in time of Vacation. So if Lessee for Life be disseised, and wast done, if he enters he shall be chargeable



able for the rest; yet in none of these cases had the Lessor any Reversion in him at the time of the wast, as regularly he ought: but these cases stand upon their particular Reasons. *1 Inst. 13. b.*

The Aunt and Neece joyn in Action of Wast done in the old Sisters Life; the Aunt alone recovers the damages. *Co. 1. Inst. 233. b.*

Tenant for Life makes a Lease for years, and enters upon his Lessee, and consents to a Recovery in Wast against him; the Lessee for years shall be for ever excluded, for, of necessity, the place wasted must be recovered: but if he had granted a Rent charge, and committed Wast, and the land recovered, the Rent had continued. *Co. 1. Inst. 233. b. Perkins 844.*

Tenant for Life does wast, and grants over his Estate, Lessor releaseth all wast to the Grantee, it shall discharge the Lessee. *Idem* of Tenant in Dower, or by the Curtesie; for, besides the Privy that endures, if the Lessor should maintain his Action, he should recover *Locum vastatum* against the Grantee, contrary to his own Release. *Co. 1. Inst. 269. b.*

Lessee does wast, and then surrenders; 'tis said, the Lessor shall maintain wast, but the Book seems to be misprinted, and that it should be [shall not maintain, &c.] for, by his own Act he hath determined his Action in

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part. Co. 1. Inst. 285. & 5 Rep. 12. b.

Wast brought against Tenant *pur auter vie in Ass*; he dyes pending the Writ, it shall not abate, but proceed for the damages, because altered by Act in Law: but if Baron and Feme, Tenants in Tail special, bring Wast, and she dies without Issue *pendente brevi*, so as the Husband becomes Tenant in Tail *apres possibility d'issue extinct*, it shall abate, because all wast must be *ad exheredationem*. And note, that Release of actions real bar wast, and so doth Actions personal, for he shall not apportion his own Action. Co. 1. Inst. 285. a.

One devises Lands by the general words *Bosc' Maherem' Miner' Carbon' in tam amplius modo & forma*, as the Lessee *habuit* or *habere potuit*; the Lessee opens a Mine, and cuts Trees to use about it, the cutting is wast, for the Trees were not granted, it being a Lease, nor do they pass as incident to the Mine, it not being open. And *Hobard* holds, that if the Mine had been open at the time of the Lease, it had been wast. *Hobard* 234. *Darcy* against *Asbwich*, *Hutton* 190. 191.

Lessee cannot change the nature of the thing devised, and therefore, not turn Meadow into Arable, or Wood into Pasture, dry up an ancient Poole, suffer a Park pale to decay, destroy a stock of Deer, Fish, &c. but may better a thing in the same kind; and therefore may dig to make a drayne in a Mea-

Meadow. *Ibidem* Owen 66. 67. *Hutt.* 103.  
*Dy.* 37. *a.* *Co.* 1. *Inst.* 53. 2 *Leon.* 174.

Lessee builds a new house, 'tis wast to suffer it to decay; not if the Lessor builds it after the Devise. *Ibidem* *Co.* 1. *Inst.* 35. *s.* *Hutt.* 103.

Whether Tenant by the Curtesie were punishable for wast by the Common Law? Or not. *Vide* *Co.* 2. *Inst.* 299. 145.

The first Statute that gave prohibition of wast and damages against Farmers, was *Marlb. cap.* 23. And where the Statute says *vastum &c. non facient*, 'tis to be understood also, *non permittent vastum*; and so 'tis in the Condition of a Lease. *Co.* 2. *Inst.* 145.

None can claim to be dispunishable of wast in a particular Estate, but by deed, because, 'tis the Lessor's disherison, *Co.* 2. *Inst.* 146. *Dy.* 281. *a.*

Lessee of a Mannor commits wast in a Tenement escheated, the Lessor shall declare in wast of a Lease of the Tenement, and maintain it by special Matter. *Co.* 2. *Inst.* 146.

At the Common Law, to prevent wast by Guardian, Tenant in dower, or by the Curtesie, the Party might have a Prohibition to the Sheriff, and by that he might have a *posse Comitatus*; and so it may be done at this day. And such Remedy as is against them at the Common Law, is against Farmers, &c. by *Marlb. ca.* 23. *Co.* 2. *Inst.* 299. *Vide* *Stat.* 10 R. 2. c. 14.

If a Lease be made to *A.* for his own life, Remainder to him for the life of *B.* or where a Remainder for years is upon an Estate for life; there, if *A.* does wast, it shall be punished, because himself had both Estates: and in the latter case, the Remainder shall not destroy the Term for years. *Co. 1. Instit. 54. & 2. Inst. 301.*

The Husband that holds in Right of his Wife (Lessee for life) does wast, the Wife dyes, the wast is not punishable, because the Husband held not, but in his Wife's Right, and the Estate was her's. *Clifton's Case, ibidem. Co. 5. Rep. 75. b.*

Although Tenant in Tail after possibility of Issue extinct be dispun. of wast, yet if he grant over his Estate, it is punishable in the Assignee. *ibidem 302.*

Tenant by Statute, Merchant, Staple, or Elegit, though they have but a Chattel, are not within the Statute of *Glocester, 1. 5.* Executors shall be punished for wast done in their own time, not in the Testators. He that holds a third or fourth part *pro indiviso*, is within the Act. Tenant for years assigns upon Condition, the Assignee does wast, and he enters, for that Condition the Action must be against the Assignee. *Ibidem.*

Tenant for Years, or Life, assigns, and takes the profits, and does wast; the Action lyes against the pernor of the profits, by 11

*H.6.*

*H. 6. c. 5, Co. 5. Rep. Booth's Case 77.*

Tenant assigns the Term (except the Trees) Wast is done in the Trees, the Action lyes against the Assignee. *Co. 5. Rep. Saunder's Case.*

Lessee commits Wast, and then assigns; Wast in the Tenant shall be maintained against the Lessee, and the place wasted, and treble Damages shall be recovered against him. *Non Tenure general* is no Plea in Wast; but *special non Tenure* is. Assignment, and no Wast done before the Assignment, or Wast done by the King's Enemies, or Tempest, or Lightning, is not punishable. *Co. 2. Inst. 302. 303.*

The Tenant shall answer for permissive Wast, unless in such case where he could not prevent the Wast; as where he is ousted by Cofsee of a Statute entred into before his Lease, and that Cofsee does wast, or by any precedent Title, *ibid. 303.*

Feme Tenant in Dower of a Mannor and Copy hold, commits Wast, the Action lies against the Tenant in Dower. *Ibid. 303.*

Femes Coverts, and Infants shall answer for Wast done by Strangers, though some have held the contrary; and so shall the Wife for wast done by the Husband for Lease made to them for Life, if she agree to the Estate. *Ibid. 303.*

Where the Wast is done *Sparfim* in houses, Woods, or Meadow, there the whole shall be recovered *ibid.* 304.

One may have an Action of Wast in the *Tenct* after the Term is determined by Expiration, Death, or the Act or Wrong of the Tenant; and therefore, if the *Term* end, hanging the Writ, it shall not abate, because maintainable for the damages; but if the Tenant surrender after the Wast done, no Writ is maintainable; for the Lessor cannot by his own Act alter the form of the Action. *Ibid.* 304.

The Heir cannot maintain an Action for Wast done to the Ancestor, because the damage belongs not to him; yet, if two parceners be, and wast is done, and one of them dyes, and wast is done again, one Action shall be maintained for both, and the Writ shall say, both Wastes were to both their Disheison, but the Judgment shall be for the place wasted to them both, and for the damages severally in their several Tenures. *Ibid.* 305.

Guardian shall not be punished for Wast done by Strangers, unless it be such as he might have prevented, and would not, for then *qui non prohibet, jubet, ibidem* 305.

If the Gnardian commit Wast, he shall by *Gloves* Ca. 5. lose the Wardship and single Damage; and if it be done so near his  
Age

Age as he could not bring his Action of Wast, or had not notice of it, then he shall recover treble damages upon the said Statute, as a common person shall. *Ibidem* 306.

Wast upon the Stat. of *Glouc' Ca.* 5. lyeth not in *Ancient Demesne*, because they cannot award a Writ to the Sheriff, to inquire. *Ibid.* 306. *Owen* 24. *contra.*

In an Action of Wast by two in the *Tenuit*, if one relinguisheth, it barrs both; not so of an Action in the *Tenet.* *Ibid.* 307.

A. has B. and C. in his Wardship, *Ratione Custodia*, and commits Wast in the Lands of B. yet he shall not lose the Wardship of C. because the Wast was not to his Disherison. *Ibid.* 306.

At the Common Law there lay an Estrepelement after Judgment; *Glouc. c.* 13. gives it, *Pendente placito*, and may be sued out with the Original. If the Tenant alien pendent the Plea, the Estrepelement may be against him and his Alienee, and the Defendant shall not have his Age in it. And tho the Statute says, *Du Tenement in demand*, yet in the *Scire Facias* to execute a Fine in a *Quid juris clamat*, or in Wast, an Estrepelement may be had, yet no Land is demanded in the Writ. Upon the Statute, the party shall recover damages after delivery of the Lands. *Co.* 5. *Rep.* 114. *b.* It lyes before

or after Judgment in Wast, and the Sheriff may take the *Posse Comitatus*, to prevent the Wast. Co. 2. *Inst.* 328. 329.

In Wast, the Process is Summons, Attachment, Distress, and then upon default, a Writ *ad Inquirend'*, and the Sheriff, by the Statute, is to go in Person, and with the Jury view every place in every Town; but he may inquire at any Town, and there cannot be less than twelve of the Jury. Co. 2. *Inst.* 140. or 146.

*Articuli super Chartas*, gives an Action of Wast against the Escheator or Sub-Escheator, if they do wast in any thing that comes into the King's hands, with a *Respondeat superior*. Co. 2. *Inst.* 571.

Wast may be in destruction of the Game of Deer, or Pigeons, though all be not destroyed, so to stop the holes of Dove-houses, to stop Coney burroughs; but, to dig Stones, Marle, or stub up old Thorns, or plough a Hop-ground, is not. *Om.* 36. 67. Co. 1. *Inst.* 51. K. 2. *Leon.* 222.

Adjudged, That if Houses or Groundfills be putrified for not scouring a Ditch, Wast lyes, *In Domibus pro non escurando*, &c. *Om.* 43.

To stub up Thorns is not wast, unless growing in a hedge-row or on a Wood, or old Thorns of fifty or sixty years growth. *Om.* 67. 1 *Inst.* 53.



One made a Feoffment to the use of himself for Life, and to another in Fee, and was punishable in Wast by him in Remainder therein; tho in the *Dr.* and *Stud.*'tis said, if Feoffment be to one for Life, he is not punishable for Wast. *Ow.* 91. 25 *Eliz. Com. Banco, Rot.* 603. *Rayer con' Durat.*

One entred into Bond not to commit Wast, and the permitting a house ruinous at the time of the Lease, to fall, was a Forfeiture of the Obligation; such Wast is not punishable, if there be no Bond, nor Covenant against it. *Owen* 29 *Eliz. Glover* against *Pike*.

It seems, that a *Quod ei desorceat* will lye upon a Recovery by default in a Writ of Wast, against Tenant in Dower, &c. But because the default was after Appearance, and so a Contempt, it lay not in *Elmer's* Case, nor because Damage on the Prin', or that Wast is a personal Action. *Vide* 3 *Cro* 263. 2 *Rolls* 102. 2. 104. 4. Damage, *Owen* 101. p. 33. *El. Co. Banco Rot.* 1125. *Elmer* against *Thatcher.* 1 *Inst.* 355. 198. 2. r. 68. b.

Lessee for years, waves Possession, and a Stranger commits Wast; the Lessor shall have wast against Lessee; and so if Lessee assigns, and continue in Possession, and does wast, the wast shall be against him. *Ow.* 141.

When

When the Writ to enquire of wast is Awarded upon *Nichil dicit*, there the Command in the Writ, that the Sheriff go to the place wasted, and enquire &c. is but Surplus; and the Sheriff needs not go thither but may enquire of it in any place in the County, because the wast is confessed; but if the Writ be to enquire at the Grand Distress, upon *Westm. 2. 24*. There such Command is necessary, and the Sheriff must go to the place, because that must better appear upon the view; yet the Entry in both cases is *Per visum Juratorum. Pop. 24. Dy. 204. a. Hutt. 44. 3 Cro. 18. 290.*

When the Interest of the Inheritance is in one person, and the Lease for years in another, though by several Demises, part at one time, part at another time, yet one Action of Wast lyes: and so if Lessor have but two third parts of the house in which the wast is done, he shall assign wast to be done in the whole; for it cannot be done in part, but 'tis to all, and though not in all, yet it goes to each part. But *14 H. 8.* where one lets several Leases of the same Lands to one person, not one, but several Actions. *Pop. 24, 25. 3 Cro. 290. 14 H. 8. 12. b.*

Lease for Life without Impeachment of Wast, Lessee has an Interest in the Trees, &c. and may give them, and shall have them who-

whoever cuts them, and shall have Trespass against a Stranger that cuts them; contrary to *Co. 4. 63. a. Dy. 184. a. Hob. 132. Pop. 195. Co. 11. 82. b. Dy. 47. b. Co. 1. Inst. 224: a. 2 Cro. 316.*

When the Wast is confessed by *Nil dicit*, the Writ to enquire is not to enquire of the Wast, as it is when the Judgment is upon the Distress by the Statute, but only of the Damage. *Hutt. 44. Tiffin against Rives.*

Trenching a Meadow, whereby it is meliorated, is not wast; but building a new house is, because it puts the Lord to more charge; and so is planting a Hop-ground, because it alters the Lord's Inheritance. *Dyer 361. b. Hutton 19. 103. Hob. 234. 1 Inst. 53. f.*

By *Fitzh and Baldwin, Ch. Inst.* One Joynt-tenant shall have Wast against his Companion by the Equity of the Statute, *cum duo vel tres*, &c. but not Parceners, because they were compellable to make Partition: and not denied. *p. 27. H. 8. Pl. 37.*

Wast, *Et inter alios Arbores*, white Thorns, each valued at 6 s. 8 d. Defendant pleads, that they were for Hedge-boot, and House-boot. Plaintiff says, there were black Thorns enough besides; and as to the Hedge-boot, is taken, that there were not enough besides, and found there were as to the House-boot: the Defendant demurs, and the

the Plaintiff enters a *Nolle prosequi* on the Demurrer, and *Cur. advisare vult* on the Verdict, and no Judgment given. *Co. Entr.* 708. 709. *Pl.* 11.

Wast and Issue of a Confirmation, and in the *Venire facias* was omitted, *Et Interim Terram illam videant*; wherefore, *obj.* they cannot take the Inquest. *Responds.* they may; the Issue here being for a collateral thing, and the Estate not to be enquired of. *P. 7. E. 4. Pl.* 2.

Wast against Baron and Feme, and she received in his default, pleads an Assignment by them, and till then, no Wast. And it seems she shall have the Plea, though it appear she can lose nothing. And for Damages she shall not be received. *Trin. 9. E. 4. 15. Vid. 22. E. 4. 35. 4. 21. H. 6. 46. 4. or 40. 42. E. 3. 22. 6.*

Wast brought by two, and one summoned, and severed, and the other recovers the moyety of the place wasted, and the Moyety of the damages & *quoad*, the VVillows *Affize* for wast, *Cur' advisari vult. P. 12. E. 4. Pl.* 1.

If one does wast, and repairs before Action brought, he may plead it and excuse himself; but, if the Condition of a Bond be not to do wast, and he does wast, and redifies, yet, Debt lyes, for the Bond was once and ever forfeited. *20 E. 4. 18. b.*

Lessor

Lessor sells Trees, Vendee cuts them; Lessee's Cattel eat the Germines, no Wast, for he not bound to fence them in, against the Lessor's own tortious Act. *Tr. Mo. 9.*

Lease for years, Remainder for Life, Tenant for years does wast, Action of Wast lyes. So if Lessor covenant that he will not sue Lessee for wast within two years, yet after the two years, he may sue him for wast done within them. But if Tenant for Life be, Remainder to Baron and Feme in special Tail, Feme dyes without Issue, wast lyes not; otherwise, if the Remainder in Fee were to the Baron, because the Tenants in Tail, after Possibility, were merged by the Fee, *per Browne, quod tamen Dy. negat.* Tenant for Life, Remainder for Life, Wast is done, he in Remainder surrenders, Wast lyes. *Co. 5. Rep. 76. b. Mo. pl. 64. Co. 5. Rep. 76. b. 2 Cro. 68. b.*

Tenants in Common cannot joyn in Wast in the *Tenet*, but Joynt-tenants or Parceners may; and also Tenants in Common in the *Tennit*, being only to recover Damages. *Ibid. Mo. f. 383. Mo. pl. 110. 127.*

He in Reversion, by way of use, brings wast against the Feme Tenant for Life; of the same use, she pleads that the place was left so ruinous at the death of her Husband, *Quod reparare non potuit*, and adjudged a good Plea. *Mo. Pl. 158.*

Wast

Wast assigned in permitting Sea-walls to be ruined, whereby, &c. if not done by sudden violence, as if a small breach were, and he permits it grow greater, it seems wast, *Et per omnes*, the permitting Decay in the Banks of the River is wast. *Mo. 173. 187. 200.*

Dower; Tenant pleads *ne unque seise que Dower*, and Issue of it. Demandant prayed a Writ of Etrepement, because great part of his Coppice wood, and the Husband dyed not seized, so she cannot have damages, yet it seems Etrepement lyes not, because Damage lyes in the Action. *Mo. Pl. 186.*

Wast, and the Writ was *quod fecit vastum in terr'* In the Count assigns wast in cutting Trees; and adjudged, it maintained not the VVrit, but if it had been assigned of digging Clay, &c. it had. *Mo. Pl. 200.*

VVast and Count of VVast done *contra prohibitionem*, after the Estrepement sued upon a Formedon, Defendant pleads *Quod non fuit vastum contra prohibitionem*. Issue, Verdict, and Judgment *pro querente*. *Mo. Pl. 1. or 245.*

'Tis VVast to take away a Partition, &c. fixed by the Lessee to the Free-hold, *sic* of Benches or Glas-windows, to take away Doors of the Houses, if they be outer doors, for defence of the houses; not in ward for Separation of Chambers. *Mo. Pl. 315.*

One

One that had power to make a Joynture of third part, makes her Joynture of a third part undivided. And this held by *Popham*, not according to the Power, which was to be *sans impeachment* of wast, and against the Tenant in common wast lyes not: so it should have been done in Severalty, by *Popham* fo. 374. But that is denyed by *Mo.fo.* 387. 388. And that wast lyes against the Tenant in Common, of a third part also, by *Popham*, the Proviso being to do it, *Sans Impeachment*, &c. And he makes an Estate for Life, with Remainder, 'tis disjunctive by reason of the Remainder; whereto, *More* answers, that 'tis but the effect of the Law, not the word of the Party, and then Remainder were created before; so he must make it by operation of Law, *Sans Impeachment*, &c. or make none: Also, 'tis not *eadem sans Impeachment*, &c. but the Remainder does at present hinder the Action; and it is not like Cases upon 32 *H.* 8. there Tenant in Tail shall not make a Lease for three Lives in Possession. So another way to satisfy the Statute, *Perrot's Case. Mo. Pl.* 506.

Tenant for Life Remainder for Life, tho Wast in the Tenant for Life be punishable, yet the Chancery will by Injunction bind him to do no wast; and such a President cited *temps. R. 2. Mo. Pl.* 748.

Error

Error to reverse a Recovery in *Lancaster*, and pendant it a Writ of Estrepement granted, and so resolved 'tis grantable in a *Scire Facias*. *Holland*, &c. against *Jackson* and *Ogden*, & sic vid. 2 *H.* 6. 13. Estrepement granted in *Scire facias*, on a Judgment in a Formedon. *Mo. Pl.* 850.

Resolved, that great Birch is used in the Country as Timber, and esteemed in Law as Timber, and 'tis wast in the particular Tenant to cut them; and so in *Cro.* are black Thorns in some Countys. Countess of *Cumberland's Case*. *Mo. Pl.* 1099. 1 *Cro.* 283. 2 *Cro.* 126.

Writ of Wast in two Towns, Count of Wast in three Towns ill, but *è contra*, if less be in the Count, than is in the Writ, 'tis good *pro tanto*. Earl of *Cumberland* against Countess Dowager *Cumberland*. *Mo. Pl.* 1185.

To convert a Horse Mill to a Hand Mill, or a Corn Mill to a Fulling Mill, is, though it be better for the Reversion, and the reason seems, because it alters the Evidence. *City of London* against *Groyme*. *Mo. Pl.* 1230. 2 *Cro.* 182.

Lessee covenants to repair at his own Cost, and the house being out of Reparation, put Timber on the Land to do it, and held a bar; for, the Covenant takes not from him the Liberty the Law gave him: but it seems the Court was of another opinion,



on, *Mo. Pl.* 80. *vid.* *Dy.* 196. *b.* 314. 4.

Lease except Trees, Lessor grants and sells the Trees to Lessee, he cuts them; resolved first, Lessee has but special Property in Trees, till severed, and then Lessor may take them, be it by Wind, or wilfully, unless Doatards. Secondly, *Sans* Impeachment of wast gives no *interest*, but that is *contra* to *Co.* 11. *Rep.* 82. 83. *Popham* 195. *Dyer* 184. *b.* Thirdly, such Interest has Lessee in Timber of Houses, if blown down, to take to rebuild; but, if he pulls them down, Lessor may take it. Fourthly, by the sale of Trees to the Lessee, they are not so re-united, but the Lessee is absolute Owner of them, for he has not an equal Interest in them and the Land, to extinguish; as if Feoffor sells the Trees to Feoffee. Fifthly, Wast may be in Glass, tho in the Lessee's own setting up, fixed by Nails or otherwise; and so in Wainscot, set up by the Lessor or Lessee, and fastned either by Nails or otherwise, to remove it if nailed. *Harlakendon's Case.* *Co.* 4. *Rep.* 62. 63. 64.

Lessee deviseth the Term, Executors do wast, and then assent to the Legacy, Wast lyes against them in the *Tenuit*; and so if the Grantee on Condition do wast, and then the Grantor enters for the Condition, yet wast in the *Tenuit* lyes against the Assignee on Condition. And if the Lessee unlawfully

ly open a Mine, and not that Term except Mines, if after the Assignee dig in it, 'tis wast in him, though the first began it, for the Exception is void. And resolved, first, Lessee may dig in Mines opened before, not open new. Secondly, if it be of the Land, and all Mines, he may open new Mines. *Sanders Case, Co. 5. R. 12. b.*

Wast lyes against an Occupant, for he is within the words of the Statute, for he holds, *Pur Terme de autre vie*, and it is against all Tenants for Life. But it lyes not against Tenant by Elegit, Statute Merchant, for they hold not, but come in by Act in Law. *Co. 6. R. 37. b.*

Lessee. for years, *Sans Impeachment of Wast* accepts a Confirmation for Life, the Priviledge is gone, because the Estate where-to it was annexed, is removed. *Co. 8. R. 76. b.*

If the Sheriff go and see the place wasted, and cause the Jury to have the View, he may take the Inquisition at another place. *Co. 8. R. 152. b.*

Lease for Life, *Sans Impeachment of Wast per parol; multis altercat*, and not resolved whether the Priviledge be good without deed; but resolved, if the Priviledge be void without Deed, yet the Estate is good, as an Estate without the Priviledge. *Co. 9. R. 9. a. 10. b.*

In Wast, for cutting down a tree, nothing shall be recovered but the Circuit of the Root, and not according to the Latitude of the Branches. *Co. 11. R. 50. 4.*

Lease for years, *Sans Impeachment*, &c. Lessor confirms his Estate for Life, the Term is merged, and he punishable for wast, so lease *pur antevie*, *Sans Impeachment*, &c. Remainder in him for his own Life, it merges his first Estate, &c. he is bare Tenant for Life, punishable for wast. *Co. 11. R. 83. b.*

Term expires, Lessee continues in Tenant at Sufferance, and does voluntary wast, his Lessor also being Tenant for years, brings Action upon the Case; and adjudged it lyes, and not Trespass, as objected by *Littleton* it ought to be, and the rather here, because the Plaintiff being but a Termor, subject to Wast, ought to sue his Action to have as much in Damages as he may be charged over. *West* against *Trend*, 1 *Cro. 135. vid. Co. 5. r. 13. b.*

Error of a Judgment in wast assigned, first, because the Wast being assigned in several things, entire Damages are taxed, which ought not to be, for some of them be Pettits not punishable, and the Court is to judge; *Sed non allocatur* being found not-intended any of them Pettit. Secondly, thirteen Jurors enquire, and they not an In-

quest of Office, as Writ to enquire of Damages for Attaint lyes; but that seemed well enough also. Thirdly, the Wast is assigned in cutting twenty Trees, and the Jury found him guilty but of two, and yet no *Misericordia pro Resid.* But *Barkley* held it well, for when they find any part of the same thing assigned, there needs no *Misericordia pro resid.* But if they find wast in some things, and no Wast in any part of one thing, as if Wast assigned in *Domibus & Boscis*, and they find it in part in *Domibus*, and none in *Boscis*, he shall be in *Misericordia pro Boscis*, but where they find a less number of trees than assigned. *Jones* and *Cro.* doubted. *K. & uxor* against *Fitzh.* 1 *Cro.* 299. 327.

Eradication of white Thorns is wast, not *succidendo* and *vendendo*, unless they grow in places for defence of Cattel, and it be so averr'd. 2 *Cro.* 126.

Lease for years with House-boot and Hay-boot, *sine impetitione vasti*, as good as *sine impetitione vasti*, and traverse to the whole, not the House-boot and Hay-boot. *Ley* against *Eyre.* 2 *Cro.* 226. or 216.

Wast, and Counts general of wast done, *ad exhibed.*, 'tis found, that the Defendant was Lessee for years, Remainder to *D. Sans Impeachment of Wast*, who is dead, and if the wast was committed in the Life of *B.*

yet

yet good amover, for, though then no Action lay, and *B.* might have licensed him to do wast, yet now he may count of it, as Wast immediately done to himself. *Bray against Tracey. 2 Cro. 688.*

Wast, and Counts of a Lease for Life; Defendant pleads, 'tis part of an Hospital whereto the Plaintiff presented him for life; it seems it lyes not, for he is in from the Foundation, and though in but for Life, the person has the time, no Reversion in him. *21 H. 6. 12.*

Wast by an Abbot, and Counts of a Lease by the Predecessor, and assigns wast general, without saying whether in the Predecessors time, or his own; and good, for were the wast committed in the Predecessors time, the Successor shall punish it, and so is *42 E. 3. 22.* And if the Predecessor had released it, yet the Predecessor may punish it; for, being in the Realty, the Predecessor could only release for his own Life. *ead. Libr. E. 3.* yet there 'tis doubted, if an Agreement had been made with the Predecessor for the wast, if it had not been a Bar. And in *21 H. 6.* where one justifies to cut Ashes for Fire-wood could be had, and that *per Curiam*; yet note in the end of the Case 'tis pleaded, and that no under-wood was there. And in this case 'tis held by some, that Ashes, Oaks, &c. under twenty years

growth, may be taken for Fire-boot, &c. but denyed by others, for they are Ashes, and 'tis held, that Lessee *Sans fait* may take House-boot, &c. as well as if by Deed, and that if Lessor in the Deed of Lease granted that he will require the House, Lessee may take Trees in his default, and pleaded it in Bar of the wast; and so seems *Dyrr* 198 b. 124. a. 24 H. 6. 46. 47. 48.

The Summons, Attachment and Distress, all returned, *nihil*, and whether a VVrit to enquire of the VVast shall be awarded, no VVrit being returned, served, or an *Alias distringas, multum dubitatur, & alitercatur*; but at last the VVrit was awarded, *To inquire of Wast, vide* 41. or 14 H. 6. 2. b. per Roll. If Baron and Feme Tenants in Common of a Term be, and wast is done, wast lyes against her after his Death, *quod alii concesserant* Trav. denyed. *Et vide F. N. B. 59.* Baron and Feme Tenants for Life, she shall not be punishable after his Death for VVast done by him 46 E. 3. 25. vid. Case. 21 H. 6. 56. a. b. H. 6. 25. b.

VVast, and assigns wast in cutting down so many Oaks, and in cutting down the Springs that came up from the Roots again: Resolved, this is double wast, and so may be double Assignment, and is not a double Assignment of the same wast, and treble Damages shall be given for each cutting; tho

tho by some it can be recovered but once,  
2 H. 12. a. b.

Tenant in Dower, or by the Courtesie, grants over their Estate, yet the Husband shall maintain an Action of Wast against them; but if he assigned his Reversion, his Assignee must have it against their Assignee Co. 1. Inst. 316. a. F. N. B. 45.

Two bring an Action of VVast, one releases; it bars both, if it be in the *Tenuit*, wherein Damages only are to be recovered, not if in the *reuer*, where *locum vastatum*, is to be recovered also. Co. 1. Inst. 355. b.

In Co. 1. Inst. 'tis held of one side, and denied by the other, that an Attachment lyes upon an Inquiry of wast. But 1 Cro. 'tis held clearly, that it does. And F. N. B. says it was so resolved by the Court, 2 H. 4. But his Opinion is contrary Co. 1. Inst. 355. b. 1 Cro. 299. F. N. B. 107. c.

The Reversion must continue in him that brings the Action, at the time of the Action brought, because 'tis said, *Ad Exheredationem*, and it must be in him at the time of the wast done, unless in special Cases; as Tenant for Life makes a Feoffment on Condition, VVast is done, and he enters for the Condition, Lessor shall have wast, so if Lessee of a Bishop commits wast in time of Vacancy the Successor shall have the Action; so if Tenant for Life be disseised,

and wast is done, and the Tenant re-enters, Lessor shall have wast, yet he had no Reversion. Note, 'tis no plea for Lessee in wast, to say generally that Lessor had no Reversion, &c. but must shew how he lost it. But in wast, by Assignee of the Reversion, such Plea general is good, *vid.* 39 E. 3. 19. 20. Wast by Successor of a Bishop, or wast done in the Predecessors time, *quere sc. bon.* for laid *ad exheredationem Ecclesie*, Co. 1. Inst. 356. a. *vid.* 1. H. 4. 26. Opinion that Successor of an Abbot or Prior shall have wast for wast done in the Predecessors time, or if a Bishop, Parson, &c. that can make Executors. *Vid.* 71 E. 3. 53. b. 43 E. 3. 8. 49 E. 3. 26. Successor of an Abbot, not chargable for wast of a Predecessor.

In wast, if the Plaintiff's Reversion determine either before, or pendant the Suit, his Action is gone; but if it be *pendente*, the Suit it must be so specified. *Ever* against *Moyle*. Tel. 141.

In Wast, the Plaintiff declares, *Quod cum seissetus fuit*, and let for years, the Defendant had wasted, and though not said of what Estate seised, (so it might be for Life) yet being *ad exheredationem*, and that alledging of Seizin but Surplus, held by most good enough. Sir *Walter Aston* against *Swetenhall*. 3 Cro. 47.



Wast assigned in the house, where, it appears, the Plaintiff has but two parts of the Reversion, yet good, he cannot assign it otherways; Wast inquired of by the Sheriff, where it was confessed by *Nihil dicit*, yet no Error. *Warnford* against *Haydock*. 3 Cro. 290.

Wast against a Husband, Tenant for life in right of his Wife, dead, not being in the *Tenet* or *Tennit*, ill; also, the Writ is *Quod fecit vastum*, and being in her right, it should have been *fecerunt vastum*. But by Co. 1. Inst. this Wast is dispunishable by her death: otherwise, if it had been a term for years. Co. 1. Inst. 54. p. Note, the Estate was made to the use of the Wife for Life, yet Action lyes. *Sackervil* against *Bagnell*. Con. to Dr. and Student. Co. 3. Cro. 356. 357.

In wast, the plaintiff prayed a writ of Etrepement against the Tenant and his Servants, and at last a Warrant against both, though doubted at first, if it lye in this Action, though it do in Writ of Entry, &c. *Anderne* against *Anderne*. 3 Cro. 393. F. N. B. 61.

In a Writ of Entry *sur disseisin* done to himself, the plaintiff prayed a writ of Etrepement, doubted if allowable, because in that Action he is to recover Damages, but because *Non constat*, whether the Tenant be able to satisfie him if he pull down his Hou-

Houses; granted. *Wright against Percy.*  
3 Cro. 484. 774.

Tenant in cutting three hundred Oaks, Defendant as to two hundred, justifies that the House was ruinous, and he cut and employed them in repairs; and for the other hundred, he cut them to have them ready to repair. *Tempore opportuno*, adjudged an ill Plea on Demurrer, for so every Lessee might cut where there is no Necessity. *Grey against Stanfeild.* 3 Cro. 593. *vid.* 498. 499.

Wast, the writ was general, and that the woman held &c. *ex dimissione A.* her former Husband, and counted that *A.* enfeoffed *B.* to the intent a Recovery be had against him to the use of *A.* for Life, Remainder to the woman for Life, which was done accordingly, and for this Judgment against the Plaintiff, for the writ ought to have been recited; for the Husband could not let to the Wife, but she is in by the Husband, and so has the Estate from the Feoffee. *Greenfeild against Dennis.* 3 Cro. 722.

*A.* lets to *B.* *B.* assigns to *C.* and *D.*; *D.* assigns to *E.* except the Trees, then 'tis enacted by Parliament, that the Heir of the Body of *A.* shall have the Land, *A.* being dead, leaving three Daughters who took Husbands, one of them dyes, the other two and their Husbands quirt; the Tenant by the Curtesie brings wast against *C.* and *E.* in the

the Term, the Term being ended, adjudged first the Writ good, notwithstanding the settling the Estate by the Statute, without shewing the special Title; and secondly, without joyning the Tenant by the Curtesie, because he not intitled to the Damages *non locum vastat*: And thirdly, the Writ supposes *quod tenuerunt*, which implies a Joynt-tenancy, now they appear Tenants in Common, good, because the Land at first one and entire; but if wast can be committed in the Trees, excepted by the Lessee not agreed; but in *Co. 5. Rep.* adjudged it does, and the Exception void. Sir Roger Lauknor against *Freed. 1 Leon. 48. 3. Cro. 17. Co. 6. Rep. 12. b.*

Lessee for Life, and he in Reversion make a Lease, wast is committed, they shall joyn and Tenant for Life recover *Locum vastatum*, and he in Reversion the damages, Lessee for Life *Sans Impeachment*, &c. Wast is committed by a Stranger, the Lessee in Trespass shall recover no Damages for the Trees cut, but only for the Entry, for the property of the Trees remaining in the Lessor. *1 Leon. 49. Co. 1. Inst. 42. a. p. 27. H. 8. p. 38.*

Lease of Lands (*exceptis arboribus grossis super Pramissa crescentibus*) Trees, then little, grow great, and are cut, if wast, *Semble non*, per *Anderson*; for they were excepted, where-

whereas great, and not only what were great at the time of the Lease. *Garrock versus Cliffe*. 1 Leon. 61.

*A.* lets to *B.* for years, and during the Term, lets to *C.* for years by Indenture to commence presently; *B.* commits wast, *A.* brings a Writ against *B.* the Defendant cannot plead *nil* wast, nor can he plead that the Lessor had nothing, for the Plaintiff will estop him by the Indenture; and though the Count be general of a Lease, and says not *per Indenturam*, yet a Replication that by Indenture, is no departure, but a corroborating of the Declaration. 1 Leon. 156.

Tenant for Life is disseised, and Disseisor commits wast, he in Reversion shall maintain an Action of wast against Tenant for Life; yet note, that by the disseisin, the Reversion was out of him. 1 Leon. 264.

If wast be assigned in a whole wood *par-*  
*sim*, if the Jury have view of the out-side of the wood, 'tis good, without entering and viewing of every part, and so of a house; other wise, if the wast were assigned in certain part of the wood, or Rooms in the house, 1 Leon. 267.

Feoffment to the use of himself and wife for Life, Remainder to his own Heir, he dyes, she commits wast, the Writ must be general, *Quas tenet de hereditate*, &c. & *non ex dimissione*, for she comes in by the Statute.

2 Leon.

2 Leon. 222. vid. Co. Entr. 706. Pl. 9. 700. Pl. 7.

Feoffment to the use of *A.* for Life, without Impeachment of wast, and power to cut and sell Trees, and make Leases; Remainder for Life to *B.* with the same power. *Latch* 163. 268. *Poph.* 193. 706. Pl. 9. *A.* makes a Lease, and dyes, *quere*, whether *B.* may cut the Trees, not agreed; but 'tis agreed, that the Clause *Sans Impeachment* gave an Interest, and *A.* might have done what he would with the Trees, but not his Executor after his Death, because it was an Interest annexed to his Estate, and determined with it: the doubt of the Remainder chiefly seems to be because the Lease ariseth partly out of the first Feoffment, and partly of the Lessors Estate for Life. Note, the Lease was excepted, the Trees and the Exception good, because Tenant for Life had an Interest by the *Sans Impeachment*. *Secher-val* versus *Dale*. *Latch* 163. 268. &c. as before.

Lessor brings wast against Lessee for Trees of the Plaintiff, the Lessor himself cut them; 'tis a good Bar, and therefore in Trespass by the Lessee against Lessor for the cutting, he shall recover only for the Fruit and Shade, because not charged over, as if a Stranger had cut them he should. *Co.* 13. r. 96. 70. *M.* 10. *H.* 7. Pl. 3. 2 *E.* 4. 2. or 7. b.

In

In wast for digging Gravel, Defendant justifies by, Command of the Lessor, no plea, for 'tis the Lessee's Land *pur temps*, not the Lessors, so he could not command him; also, 'tis *per parol*, and without Deed, and against the Tenant for Life, yet *dist.* such a Command to cut Trees, good, because not the Lessee's but Lessor's: and that is agreed in *Co. 11. R. 48. b. H. 2. H. 7. Pl. 20. M. 10. H. 7. Pl. 3.*

Feoffee to use, *Cestuy que use*, makes a lease for years, according to the Statute *R. 3.* The Reversion remains in the Feoffee, for the Statute does but give Authority to *Cestuy que use* to dispose; as where one wills that his Executor shall sell, if Lessee commits wast, the Feoffee shall bring the Action, tho no Privy; because they could not have any; so shall the Lord in Escheate maintain Wast, yet he had not Privy. *Mi. 5. H. 7. Pl. 11. H. 8. H. 7. Pl. 1. Tr. 26. H. 8. Pl. 131. or 31.*

'Tis wast to pull down, or suffer a wall to go to Ruine, be it made of Wood, Mud, or Stone, or be it within the house for Separation, or without for Inclosure; so to destroy wood of halle or willow, not to cut them Husbandly. To cut Fruit Trees in an Orchard, and destroy them, is wast, not if they grow in Hedges and Closures: and if a house be ruinous at the Entry, 'tis no wast

to suffer it to decay, otherwise, if not ruinous at the Entry, but where 'tis held, ploughing Meadows is no wast, 'tis no Law. *Hob. 234. Ow. 66. M. 10. H. 7. Pl. 3. 4.*

In an Action of Wast in the *Tenuit*, an Accord is a good Plea, because only damages to be recovered, not in the *Tenuit*, because *locum vastatum* is to be recovered also. *Co. Entr. 706. 707. Pl. 9. H. 11. H. 7. Pl. 7. P. 13. H. 7. Pl. 3. Co. 6. R. 44. a.*

Upon *Scire facias* of a Judgment in wast, one may have a Writ of Estrepement, or in any Suit where no Damages are to be recovered; but not *Scire facias*, of wast committed after the first *Scire facias*, because he might have had Estrepement at first: But for wast after Estrepement, a *Scire facias* lyes to shew Cause why he committed the wast; and a *Scire facias* lyes in Affise for wast done after Judgment, not before Judgment, because he cannot recover Damages for its after verdict, but in a Formedon not; because he might have had Estrepement, and *Pl. 20. Error of a Judgment in Affise*, and the Plaintiff in the Error prayed an Estrepement, and could not have it, because he may, (it seems) have *Scire facias* for damages done after the Judgment, &c. But questioned, *per Fennel*, because, by the Statute he finds Security in the Writ specified, to answer for all the Damages. *Mich. 14. H. 7.*

*H. 7. Pl. 20.* but *vid. 32 or 33 H. 6. b. a.* In *Scire facias* of a Fine Estrepeement lyes:

Lessee does wast in a corner of a Wood only, the part, not the whole, shall be recovered; but if he do in the whole Wood, and there be plots of ground within the Wood, that shall be recovered with the Wood. *Tsin. 15. H. 7. Pl. 21.*

Furnaces, Fatts, Posts, Rails, &c. fixed to the Free-hold by Lessee for years, 'tis hold by some, that if he remove them during the Term, 'tis no Wast, *quod qu.* But agreed, that if he leave them there till the Term ended, he cannot remove them. *Vid. 42 E. 3. 6. a. 6. M. 20. H. 7. Pl. 24. Trin. 21. H. 7. Pl. 4. Owen 70.*

Lease, *Absque impetitione vasti*, in Wast he shall plead that in Excuse; but if the Lease at first were given, and then a grant after that he shall not be punished in Wast; it is not pleadable in Bar, but to bind as a Covenant. *Vide* divers such Cases, 21 *H. 7. 30.*

Tenant for life grants his Estate to one *Parcener* in Reversion, and her Husband, 'tis no Surrender, and if the Baron and Feme do wast, the other Sister shall bring a Writ in all their names, and the Baron and Feme shall be summoned and severed. *M. 2. H. 7. Pl. 60.*

In wast by Lessor, the Lessee pleads not  
guilt;



guilty, and gives in Evidence, a grant to cut  
*&c.* to repair *&c.* And *per Brook, Pollard, and  
 Elliot*, it was no wast, but ought to have  
 been pleaded, and not given in Evidence, for  
 thereby the Advantage thereof is lost, *Ad  
 quod Bradnet concessit*, but held it wast, but  
 not punishable Wast; and he held, that if a  
 Lessor covenant to repair, and do not, Les-  
 see may do it, and deduct it out of the Rent.  
 And if one covenant to repair a ruinous  
 house, if he do not, 'tis wast, but he may  
 take Trees, else it had not; yet, in that  
 case he might have repaired it, and taken  
 Trees to do it, though not bound to do it.  
 And at Common law, Lessee might take  
 Boots, but if excessive, it is Wast; Lessee  
 suffers Posts, Pales, *&c.* to decay, it is wast.  
*Trin. 12. H. 8. Pl. 1. or 4.*

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B b

Wills.

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*Wills.*

**W**ills and Testaments were originally proved at the Common Law, as *Perkins* confesses. and *Leonard* says, they are by the Curtesie of *England* proved in the Spiritual Court, not *de communi jure*, nor in other Nations; and in divers Mannors, the Lords have the Probate at this day. *Co. 5. Rep. 73. b. 16. a. 9. Rep. 38. a. 5. Rep. 30. b.*

Issue at Common Law, for Lands devised by Will, and the question, whether a Will or not; and now they moved at the Spiritual Court to prove it, which will blemish the Evidence at the Common Law; wherefore, prohibition prayed, but granted only *quoad* the lands, and that it be proved *quoad bona*. *Hill* against *Thornton*. 1 Cro. 118.

Debt on a Bond, conditioned, he permit his Wife to make a Will to the value of 50 *l.* and 'tis found on Issue, *Nullum fecit voluntatem*, &c. that she did make a Will of 50 *l.* but was covert, 'tis for the Plaintiff, for, though properly a Feme-Covert can make no Will in Law, yet 'tis a Will within the Intent of the

the

the Condition, and the Husband is bound to perform it. *Marriot* vers. *Kinsman*. 1 Cro. 159. And so *Tilly* and *Parryes* Case, 273, 274. Bond to pay 300 l. to such Persons and Uses as the Wife should appoint: she appoints in form of a Will, he is bound to pay it. And 433 Bond to permit her to make a Will, and pay, &c. Plea that he permitted, &c. without pleading payment, not good.

Action upon the Case, lyes not for Non-payment of a Legacy; for no Duty in our Law, so it cannot take notice of the wrong in Non payment. *Mich.* 18. *Car.* 2. *Nicholson* against *Sherman*, in *Banco Regis*.

Bond conditioned, that the Wife shall make a Will of 300 l. in presence of the Husband, if he will be present, if not, in his Absence; she makes it (and it appears not that he was requested to be, or that he was, present) of 250 l. to several persons, and not an entire Legacy; yet, after Verdict the Plaintiff had Judgment: for, the Intent was, that she should make a Will whether he would, or not; and she needed not devise all to one, nor devise the whole 300 l. for *Cui licet quod majus*, &c. *Mich.* 14. *Car.* 2. *Harris* against *Bury*, in *Banco Regis*.

Debt by A. as Executor, the Defendant prays Oyer of the Will, which was thus; *Memorandum, Quod A. B. fecit Testamentum*

*Nuncupativum in hunc modum, viz. Constituit C. D. fore Executorem suum.* And this was under Seal of the Ordinary, and resolved a good Will, and he Executor, and well able to sue, and so was it decided upon Appeal to the Delegates. *Mich. 16. Car. 2. Lewis against Shaw, in B. R.*

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### Witnesses.

**H**E that is attainted of a false Verdict, Conspiracy, or convicted of Perjury, Premunire, or Forgery upon 5 *Eliz.* or Felony, or that has stood in the Pillory, lost his Ears, been stigmatiz'd, &c. whereby he becomes infamous, or Recr. ant in a Writ of Right, or an Infidel, under Age of Discretion, or interess'd, ought not to be a Witness, nor a man's Wife for or against her Husband. But one outlawed in personal Actions may be a witness *Co. 1. Inst. 6. b. 25. J. K.*

Witnesses are nor to prove a Negative. *ibid.*

Where Tryal is by Witnesses, there ought to be two at the least. *ibid.*

A Juror may give Evidence as a Witness to his Companions, but it must be publickly, by Examination in Court, not privately to his Fellows. *Stiles Rep.*

233.

Bail for the Defendant being a Witness for him, upon motion was taken off the File, and new Bail filed. *Idem.* 385.

A Felon that has been burned in the hand, may be a Witness, for he may purchase, and his Punishment has satisfied his Offence. *Idem* 385.

In Ejectment, he that had the Inheritance of the Land was admitted as a Witness, where note, the Plaintiff and Defendant both claimed under one person. *Idem* 482.

A Counsellor at Bar being examined as a Witness for his Clyent, was denied to be examined on the other side; for he shall not be put to discover the Secrets of his Clyents Cause. *Idem* 449.

Debt on 5 *Eliz.* 9. because the Wife did not appear, whereas he served her, and tendered to her, her Charges, &c. to his Damage. And though not laid what Damage, yet being for the 10<sup>l</sup>. upon the Statute, not for his damages for her not appearing, and a Feme Covert being within the Statute, 'twas held good enough. 3 *Cro.* 130. 1 *Leon.* 122. Note, she being the person

who was to appear, the Charges are to be tendred to her or her Husband. *Idem ibid.*

Debt for 10 *l.* against a Witness, that being Subpena'd, appeared not; moved first, 'tis not shewed that the Subpena was left; resolved, it needs not, for it might be for more Witnesses. 2. There was but 12 *d.* delivered, but resolved, since he promised to pay the rest, and the Witness accepted the 12 *d.* 'tis good, else the Witness had not been bound 'till the whole Charges had been tendred. But thirdly, because he averred not that he was dammified by the Non-Appearance of the Witness, though the Action be but for the ten pound Penalty, and not for the Damages over. Resolved, it lyes not. 1 Cro. 376. 388.

Judgment staid, because the Verdict was had upon the Testimony of one Witness, and he since convict of Perjury in the very same thing. *Pasch. 17. Car. 2. Banco Regis.*

In Deceit for forging a Will, one that took a Legacy by the same Will, was allowed and sworn as a Witness in a Tryal for the Forgery; for this makes nothing to the Probate of the Will, or Recovery of the Legacy in the Spiritual Court, nor do they take notice of it.

Moved

Moved to examine a material Witness that lay dying; and it was said by the Court, that if the adverse party did consent, it might be done, else they could not compell him. *Mich. 13. Car. 2. B. R.*

A Councillor may be examined as a Witness against his Clyent, so far as it is of his own Knowledge, not what he knows by the revealing of his Clyent. *Pasc. 15. Car. 2. B. R.*

One shall not justifie what he heard another say. *ibid.*

In an Indictment for beating one of the King's Messengers, the Witnesses for the Defendant were sworn, because, though against the King and criminal, yet not Capital. *Pasc. 17. Car. 2. B. R.*

One that was a Witness indorsed to the Livery upon a Feoffment, having part of the Lands as Tenant at Will, was allowed as a Witness in the Tryal on the Feoffment, afterwards in a Tryal at Bar. *Bulstrodes Rep. 102.*

A Person attainted of Felony, though afterwards pardoned by the King, is incapable after of being a Witness, and therefore a Suggestion being proved only by two such, a Consultation was granted. *2 Bulstr. 154.*

## Words.

**T**O say of a Woman, that *J. S.* did be-  
get her with Child, and she had a Child  
by him; by speaking whereof, she lost a  
Marriage with *I. D.* Although these words  
are a Spiritual Slander, yet the loss of Mar-  
riage is Temporal, and therefore the Acti-  
on lyes for them. *Co. 4. 16. b. Ann Davis a-*  
*gainst Gardner*, adjudged.

So if a Man saith of a Woman, that *J. S.*  
had the use of her Body, by which she loseth  
her Marriage, an Action lyes. *Pasch. 5.*  
*Jac. B. R. Dame Morison against Case*, ad-  
judged.

If a man says to *J. S.* *Thou art a Whore.*  
*Master, for thou hast lain with B's Wife, and*  
*hadst to do with her against a Chest.* By which  
he lost his Marriage with *A. D. &c.* *I. S.*  
shall have an Action for these words. *2 Cro.*  
*323. Mathews Case. Mich. 12. Jac. B. R. Sell*  
*against Fairee, per Cur.*

To say to a Woman, *Thou art a Whore,*  
*I will marr thy Marriage,* by which she lo-  
seth her Marriage, an Action lyes. *Trim.*  
*22 Jac. B. R. Tonsen against Spring*, ad-  
judged



judged upon Arrest of Judgment.

In Action upon the Case, if the Plaintiff declare that she hath many Wooers to marry her, and that the Defendant said of her, She is with Child, and hath taken Physick for it; whereby, she came into Dilgrace, *Et perdidit consortium vicinorum suorum*, &c. Although that it be not alledged, that she lost any Marriage thereby, yet the Action lyes. *Mich. 21. Jac. B. R. Medhurst against Balam*; adjudged in Arrest of Judgment.

If a man saith to an other, *Thou wast found in Bed with J. S. his Wife*; by reason of the speaking of which words, he lost his Marriage with *A. S. &c.* Although that he might be in Bed with her, without any ill done, yet because that it sounds in Disgrace, and he hath lost his Marriage by it, the Action lyes. *Mich. 8. Car. B. R. Southal against Dawson*; adjudg'd in Arrest of Judgment.

If the Plaintiff in an Action of the Case for words, declare, that the Defendant said of him, *He had the use of my Wife's Body by Force*; by reason of which words, he was brought before certain Justices, &c. and examined by them, for a Rape committed by him upon the said Woman, whereupon to purge himself thereof, he expended divers Sums of Money; an Acti-  
on

on lyes upon this Declaration for the temporal Damage he had thereby. *Mich. 9. Car. B. R. Harris against Smith*; adjudged upon Writ of Error.

In Action upon the Case, if the plaintiff declares, that in *London*, by the Custom, a Common Whore ought to be carted, and a Bason rung before her; And that the Defendant spoke these words of the Plaintiff, *Thou art a Whore, and a common Whore, and art a Bawd to thy Mistress, and I will have a Bason tinged before thee*; the Action well lyes upon this Declaration for these Words. *Trin. 15. Car. B. R. Hassell against Capcot*; adjudged in Arrest of Judgment.

In Action upon the Case, if the Plaintiff declare, that in *London* there is a Custom, that a Bawd ought to be carted; and the Defendant said these words of the Plaintiff, *She is a Bawd, and I will have her carted*. *Hill. 15 Car. B. R. Riley against Lewes*; adjudged in Arrest of Judgment.

If the Plaintiff declares in an Action upon the Case, that whereas he was a Parishoner of S. the Defendant being Vicar there, to the intent to scandalize the plaintiff, and to create an evil opinion of the plaintiff among his Neighbours, so that they *Abstraherent seipsos à consortio* of the plaintiff,

*tanquam ab homine excommunicato, & nulla fide aut credentia digno*, and to exclude the Plaintiff unjustly from the Church, and for a long time, to deprive him of the benefit of hearing divine Service in the said Church; the Defendant in time of divine Service in the Church in the hearing of the parishioners maliciously pronounced, the plaintiff excommunicated, *Prætextu cujusdam Instrumenti*, by him received from the Ordinary, whereas he never had any such Instrument of Excommunication, nor was he excommunicated. And also at another time to the same Intent aforesaid, in time of Divine Service in the hearing of the parishioners maliciously pronounced the plaintiff excommunicated, and refused farther to celebrate divine Service, until the plaintiff departed out of the Church; whereupon, the plaintiff was compelled to go out of the Church, whereas the plaintiff was not excommunicated; whereby the plaintiff was scandalized, and hindred from hearing Divine Service for a long time, and for the clearing of this Scandal, and of his Innocency therein, *Diversos corporis sui grandes labores capere, & diversas ingentes denariorum summas erogare & exponere coactus fuit, in extremam depauperationem & ignominium maximum* of the plaintiff. This Action lyes, notwithstanding he doth not shew that any person did avoid his Company, or refu-

refused to trade or deal with him; and notwithstanding he doth not set forth any temporal or spiritual loss: for it is a great Scandal and malicious, tho to his Soul, and spiritual. *Mich. Car. B. R. Barnabas against Traunter.* Adjudged in Arrest of Judgment.

if a man saith of another, who hath lands by discent, *That he is a Bastard*, an Action upon the Case lyes, for it tends to his Disinheritance, and disturbance by Suit. *Mich. 3. Jac. B. R. per Curiam.*

In an Action upon the Case, if the plaintiff declare that he was Heir apparent to his Father, and *B. his Brother*, and that either of them hath Lands in Fee to the value of 40 *l. per annum*, and that they did intend to suffer the said Lands to descend to him, or to convey the same to him; yet the defendant intending to disinherit the plaintiff, said to the plaintiff, *Thou art a Bastard*, whereby his Father and Brother intended to disinherit him, and to convey their Lands to another. The Action lyes upon this Declaration, for the temporal damage which might come to him thereby. *Pasch. 13. Car. B. R. Humfries against Stutfield.* Adjudged in Arrest of Judgment.

Where there was Grand-father, Father, and Son, and the Son brought an Action upon the Case, and declared that the Grand-father (whose heir he is) entailed certain Lands upon him and the Heirs males of his Body, and the

the Defendant intending to scandalize his possibility that he hath to inherit this Land, as Heir of the body of his Grand-father, said that he was a *Bastard*, notwithstanding that the Grand-father and Father were alive, yet the Action brought as above by the Son did lye. *Humfries Case ubi supra.*

In an Action upon the Case, if the Plaintiff declare that he exhibited Articles in the Kings Bench against the defendant for the good abearing, and swear the Articles to be true before Justice *W.* (*Innuendo* the said Oath taken upon the said Articles) although it be not averr'd that the Oath was taken of Record; yet the Action lyes, for it shall be intended the Articles exhibited in Court, and sworn before a Justice of the Court. *Mieb. 10. Car. B. R. Yolden against Wannel.* Adjudged in Arrest of Judgment.

If a man saith of an other, *He hath written a forged Will, wherein I will prove him false, forsworn, and perjur'd, in a Will that he made of John Hunt*, an Action lyes for these words, for it shall be intended, that he was perjur'd in his Oath taken, touching the said Will. *Hil. 12. Car. in B. R. Cowley against Clough.*

In an Action upon the Case, if the plaintiff declare, that there was a Writ to inquire of Damages between *A.* and *B.* in a Court of *C.* at the Sessions-house, where he was sworn

to give Evidence according to his Knowledge; and afterwards the Defendant said of him, *He is a forsworn Rogue, in taking an Oath at the Sessions House*; an Action lyes for these words, although it was objected in Arrest of Judgment, that if he swore falsely before an Inquest of Office, it is not within the Statute of 5 *Eliz.* for admit it were not, yet they all agreed, that for such forswearing; at the common Law he may be indicted; and therefore, if it be out of the Statute, yet an Action lyes for this Slander. *Mich. 13. Car. Pruer against Moadman.*

If a man saith of an other, *He is a Perjuror. he swore once for me, and the second time hath perjur'd himself with J. S. (a Stranger)* Action lyes. *Mich. 9. Car. in Camera Scaccarii.* Adjudg'd in Writ of Error.

If a man saith of J. S. *I will prove J. S. forsworn, and that ten men can justifie; and I could prove him perjur'd if I would.* The Action lyes not for the first words, but it lyes for the latter; for it is a great Slander, to be reputed that it is in the power of any man to prove him perjur'd. *Pasch. 5. Jas. B. R. Whitacre against Loverden. per Cur.*

If a man saith to another, *[I did not know that Mr. W. was your Brother, he hath forsworn himself, and I will prove him perjur'd or else I will bear his Charges.]* Action lyes for these words, although they are spoken  
condi-

conditionally to bear his Charges, if he did not prove him perjur'd. *Mich. 37. 38 Eliz. Woodroffs Case* adjudged.

If a man saith of an other, *That he was perjur'd, and he would prove him so by two Witnesses.* Action lyes for these words, although he doth not say in what Court he was perjur'd, or how. *Trin. 39. Eliz. B. R. Rayners case* adjudged.

If a man saith to an other, *Thou wast perjur'd in a Court of Tottenham,* Action lyes, for it shall be intended a sufficient Court to hold Plea. *Pasch. 40. El. B. R.*

If a man saith to another, *Thou art a forsworn Knaue, and wast indicted by twelve men, and hast compounded for it,* Action lyes, for all being laid together, it appears that he intended a Perjury in a Court of Record. *Mich. 1. Car. Gilbertin against Row;* adjudged in Arrest of Judgment.

If a man saith to another, *Thou art a forsworn Knaue, and I will prove thee forsworn in the Ecclesiastical Court.* Action lyes for these words, for the Ecclesiastical Court is a Court known. *Pasch. 40. Eliz. B. R. Shaw's Case,* adjudged.

To say to a man, *Thou art a Whore master;* or to a Woman, *Thou art a Whore;* no Action lyes, because that it is merely spiritual, without any temporal loss. *Trin. 11. Jac. B. R. Matthew against Croke, per Curiam.*  
2 Cro. 323. To

To say of a married man *He hath had two Bastards thirty six years ago, and he should pay for keeping of them*: no Action lyes, altho he aver that by force of those words there was Contention between him and his Wife, and he was in danger to be divorc'd, for there is not any temporal Loss, and the Offence was pardon'd by many general Pardons, it being 36 years before. *Pasch. 16. Jac. B. R. Randal against Beal*; adjudged in Arrest of Judgment.

*He had a Bastard-child by Jennings his Wife of Northampton*; by speaking of which words, the Plaintiff saith in his Declaration, that he refused to marry with *A. S.* whereas it ought to be, that *A. S.* refused to marry with him. The Action lyes not. *Mich. 11. Car. B. R. Carters Case, per Cur.*

If a man saith to a Feme Covert, *Thou bold Cullobine-bastard-bearing Whore, thou didst throw thy Bastard into the Dock at White Chapel*; no Action lyes for these words, altho it may be intended that she had a Bastard by the said Cullobine, (who in truth was her husband) before Marriage; inasmuch as there appears not to be any temporal damage by it; by loss of any Marriage; but only a Punishment by the Statute, for having a Bastard, which is not sufficient cause to maintain the Action. *Hill. 10. Car. B. R. Cullobine & ux. against Vinor*; adjudged in Arrest of Judgment.



In an Action upon the Case, if the plaintiff declare, that whereas divers persons *comabantur & desiderabant*, to marry their Cousins and Friends to him; the defendant (being a woman, on purpose to scandalize the Plaintiff, and to hinder him from marrying with any Woman) preferr'd a scandalous Libel against the Plaintiff in the Spiritual Court, thereby charging him, that he under colour of being a Suitor to her in the way of Marriage, resorted often to her in the Night, and lay with her, and begot a Child of her body, and after published and affirmed the same matter before divers persons falsely and maliciously, whereby the plaintiff was so much scandalized, that all honest persons having the fear of God before them, *aliquem mulierem de filialis aut consanguineis suis in legitimo Matrimonio cum quarente copulari & jungi semper postea & hucusque omnino recusaverunt & adhuc recusant*. And upon *Not guilty* pleaded, the Jury found a special Verdict, *scil.* that the defendant preferred the said, *Famosum & Scandalosum Libellum*, &c. and that she afterwards at the Sessions of the Peace, being examined who was the Father of the said Child begotten of her body, said and affirmed, that the Plaintiff was, and that she did affirm it *falso & injuriose* of the Plaintiff, and that by reason thereof, the Plaintiff was much scandaliz'd in his name and Fame;

Knave, for he swore that the wood was worth 40 s. where it was dear of 13 s. 4 d. No Action lyes for those words, though he aver, that there was Communication between them of the matter at the Assises, where the Plaintiff was sworn as a Witness, because that he did not say directly, that the Wood was not worth 40 s. but that it was dear of 13 s. 4 d. Also, it doth not appear, that the Defendant intended it sworn at the Assises. *Hill. 13. Jac. B. R. Inter Stephen Aphorpe and Cockerel, adjudged.*

If a man saith to an other, *Thou wert forsworn in B. Court*, which is but a *Court-Baron*, no Action lyes, because it is *no Court of Record*. *Pasch. 8. Jac. in Scaccario. Inter Perie and Rock, agreed per Curiam.*

If a man saith to another, *Thou art forsworn, and didst take a false Oath at the Assises at Hereford, against J. S.* No Action lyes for these words, without an Averment, that it was at a Tryal or before the Court or Jury; for it might be at the Assises in a private house, or other place. *Pasch. 15. Car. B. R. Inter Prichard and Smith. Adjudged per Curiam.*

If a man saith to an other, *Thou deservest to be hanged*, no Action lyes for these Words, because it only expresseth his Opinion and Judgment of him. *Trin. 4. Jac. Inter Hake and Molton, adjudged.*

which Case, a corporal punishment is to be inflicted by the Statute. *Hill. 5. Car. B. R. Lightfoot against Pigot. Rot. 423. per Curiam.* It being moved in Arrest of Judgment, and the plaintiff never had Judgment in it. *Mich. 1650 inter Winter and Barnard* adjudged.

In Action upon the Case for words, the plaintiff, *Thomas Browne*, declares, that one *A. G.* had a Bastard Son begotten of her Body, then living; the Defendant knowing it, of his Malice to defame him, and to bring him in danger of the Statute of 18 *Eliz.* having Speech of the said Bastard, and of the plaintiff, said of the Plaintiff, that *Brown* is the reputed Father of that Child, whereby he was greatly prejudiced in bargaining and selling, and put to great Expences for the clearing of himself *in hac parte*; the Action lyes not for these words upon this Declaration, because it is not said by the plaintiff, that he was to be punished by the said Statute, for he was not to have corporal punishment, or to be imprisoned, unless the Bastard be some charge to the Parish. *Hill. 11. Car. B. R. inter Salter and Brown.* Adjudged in Writ of Error.

In an Action upon the Case for scandalous words, if the plaintiff declare that the Defendant said these words of the plaintiff, being a Feme sole, *viz. This is that Whore that my man A. got a Bastard by, and withal,*

*spent all my money.* And being asked by an other person standing by, whether he were not mistaken, for the Maid hath been but little above a year in Town; the defendant replied, *The Quean hath been too long to my Cost.* No Action lyes for these words, for, to say that a Woman had a Bastard is no cause of Action. *Trin. 1651. Inter Owen and Jevan.* Adjudged in Arrest of Judgment.

If a man saith of another, *He was the true Patron of the Advowson of S. but he hath lost that Patronage and Presentation, by being a Symonist and a Recusant, both which I will prove him to be;* yet no Action lyes, for by the Symony only comes the loss of the Presentation, *pro hac vice* by the Temporal Law, and the Recusancy only toucheth him in Religion; for it doth not appear that he intends him to be a Recusant, according to the Statute. *Trin. 16. Jac. B. R. Sir John Taffborough's Case* adjudged in Arrest of Judgment.

If a man saith of an other, *He hath forsworn himself;* no Action lyes for these words. *Pasch. 40. Eliz. B. R.*

To say to a man, *Thou hast forsworn thy self in Leak Court,* no Action lyes, without shewing what manner of Court it is, because that it cannot be intended nor known whether it be such a Court as may compel one to swear or not. *Mich 8. Jac. B. R. Inter Law and Bennet, per Curiam.* If

If a man saith of an other, He did forswear me (*ineuendo* the plaintiff) 46 s. worth of Tithes in *Canterbury* Court, no Action lyes for these words, for there are divers Courts in *Canterbury*, and it is not shewn in what Court, nor before what Judge, nor that the Judge had Authority to hold Plea of Tithes. *Pasch. 43. Eliz. B. R. Inter Bray and Partridge* adjudged.

If a man say of J. S. *I had not been cast in that Action if it had not been for the Oath of J. S. and he was forsworn; and I marvel that B. would marry his Daughter to such a forsworn man.* In an Action upon the case for these words, if the Plaintiff aver that there was an Issue between him and A. and that, *Ad Curiam Baronis de Geton Soca Domini Regis tenta apud S. in Comitatu predicto.* He himself was produced as a Witness, and sworn about the matter of the Issue; and afterwards, the defendant having Communication of this Issue, spoke the words aforesaid. No Action lyes upon this Declaration, because that it is not alledged, that S. is within the Soke of *Geton*, and so peradventure, the Court was held out of their Jurisdiction; and also, because that it is not alledged that he was sworn about a matter pertinent to the Issue. *Mich. 11. Jac. B. R. Inter Crawford and Brice*, adjudged.

If a man saith of another, he is a forsworn  
Knave

and that all honest persons having the Fear of God before them *Aliquam mulierem de filiabus & consanguineis suis in legitimo matrimonio cum quarente copulari & jungi semper postea hucusque recusaverunt & adhuc recusant.* The Action in this case lyes not upon this special Verdict, because here doth not appear any malicious Prosecution, and here there is not alledged or found any loss of any particular Marriage, or that he had any Communication of any particular Marriage; and this general matter, *That all honest persons refuse by reason thereof, to marry their Daughters or Cousins to him,* is too general. *Mich. 11. Car. B. R. inter Norman and Simons, per Cur.* Adjudged in the Exchequer Chamber, and the Judgment given *è contra* in *B. R.* reversed accordingly.

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If a man saith to a woman, *Thou hadst a Bastard*, no Action lyes, because it doth not appear thereby, that he intended that the Bastard was chargeable to the Parish, in which

If a man saith to J. S. *Thou art a scurvey bad Fellow, and hast done that thou deservest to be hanged.* No Action lyes. *Mich. 11. Car. B. R. inter Fisher and Atkinson*; adjudged *per Cur.* in arrest of Judgment. after Verdict for the plaintiff.

If a man saith to another, *You are no true Subject to the King,* no Action lyes for these words, because they are too general; for it might be, he had not paid his Taxes. *Mich. 5. Jac. B. R. inter Smith and Turner,* adjudged.

If a man saith to another, *Thou art a Rogue, and an arrant Rogue, and I will prove thee to be a Rogue;* no Action lyes. *Mich. 41. & 42. Eliz. B. R.* adjudged.

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**FINIS.**

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Of some Estoppels, none shall have Advantage but Parties or Privies, 120. And of some, every one shall have advantage, *ibid.*

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In what case one shall estop another, *ibid.*

Where I am barred of Land the Estoppel shall pass with it; but of other Lands it shall be no Estoppel against me, *ibid.*

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**FINIS.**

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